At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, giving counsel for the Claimant 3 working days after receipt thereof to file electronic objections as to form. The proposed decision was filed, electronically, on January 20, 2014 On January 21, 2015, counsel for the Claimant filed comments on the proposed decision with counsel for the Respondents, which were forwarded to the ALJ on the same date. The comments were proofreading edits and not objections. The edits are well taken. After a consideration of the proposed decision and the editing comments, the ALJ has modified the proposal and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns the Claimant's request for post maximum medical improvement (MMI) medical benefits (*Grover* medicals), including hip replacement surgery.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The ALJ has jurisdiction to hear the issue of whether the Claimant is entitled to an order awarding medical benefits after MMI.

2. The Claimant is a fifty-one year old male who was injured on March 10, 2011, when he fell from a ladder while installing vent covers. He sustained right arm radial and ulnar fractures and a right acetabular (hip) fracture. As a result of these injuries and the treatment thereto, the Claimant also developed a sciatic nerve condition.

3. The Respondents filed a Final Admission of Liability (FAL), dated April 1, 2014, admitting for temporary disability benefits through January 16, 2012; and, for scheduled permanent partial disability (PPD) benefits of 13% of the right upper extremity (RUE) and 27% of the right lower extremity (RLE); and, denying *Grover* medicals, pursuant to the opinion of Division Independent Medical Examiner (DIME), Franklin Shih, M.D. Medical benefits were provided to the Claimant to treat the injuries he sustained. He had surgery and follow up care for his injuries through his authorized

treating physician (ATP), Amy Sheeder, M.D., and her referrals. The FAL contained language advising the Claimant that he must file an objection and an Application for Hearing on any disputed issues within 30-days, which was substantially done as herein below found. The ALJ finds that the statute, § 8-43-203 (2) (b) (UII) (A), C.R.S., does not require any particular format in the request for hearing—only that the request be filed within 30-days.

Medical

4. On August 19, 2013 Edward Jonassen, M.D., an orthopedic surgeon, stated that the Claimant had reached MMI [Resp. Exhibit J, Bates stamp 58].

5. Dr. Sheeder agreed with the MMI opinion of Dr. Jonassen, and she referred the Claimant to Gary Hess, M.D., who is Level II accredited, for an impairment rating. [Resp. Ex. H, Bates stamp 40-41.] On October 15, 2013, Dr. Hess was of the opinion that the lingering effects of the sciatic nerve injury kept the Claimant from being at MMI [Resp. Ex. F, Bates stamp 23]. Dr. Sheeder agreed with Dr. Hess and stated that the Claimant was not at MMI [Resp. Ex. H, Bates stamp 38].

6. Dr. Hess noted at the time of the above evaluation that the Claimant has arthritis in his right hip [Resp. Ex. F, Bates stamp 23]. Dr. Hess stated: "It should be noted that this patient has evidence of posttraumatic arthritis in the right hip and will someday require hip replacement surgery **if he becomes more symptomatic**." (emphasis supplied) [Resp. Ex. F, Bates stamp 24].

The Division Independent Medical Examination (DIME) of Dr. Shih

7. A DIME was requested by the Respondents, pursuant to § 8-42-107 (8) (a) (II), C.R.S., and it was performed by Dr. Shih on March 11, 2014. Dr. Shih placed the Clamant at MMI as of August 9, 2013. He assigned a RUE impairment of 13% and a RLE impairment of 27%. The FAL herein above referenced was filed, based on DIME Dr. Shih's opinion.

Subsequent to the DIME

8. The Claimant was seen in follow up by Dr. Hess's partner, Jared L. Michalson, M.D., on March 20, 2014. Dr. Michalson noted x-ray results confirming "mild degenerative changes" in the right elbow and hip. Regarding the right hip, Dr. Michalson stated, "I would not expect either of these areas in terms of arthritic changes to improve and would expect gradual worsening over time as consistent with posttraumatic arthritis." [Resp. Ex. G, Bates stamp 28].

9. Medical benefits were denied in the FAL, based on the post-DIME follow up evaluation with Dr. Sheeder on March 31, 2014. Dr. Sheeder discussed the DIME

report of Dr. Shih. Under the "Plan" section of her chart note, Dr. Sheeder stated "no follow up needed at present as at MMI with no intermittent care needed" [Resp. Ex. H, Bates stamp 32]. Dr. Sheeder completed the M164 form report and stated under Return Appointment – **"None needed"** (emphasis supplied). Dr. Sheeder also checked the box to indicate **no maintenance care after maximum medical improvement was required** (emphasis supplied) [Resp. Ex. H, Bates stamp 34]. The Claimant was self-represented at the time he received the FAL. The FAL contains language which advises the Claimant to file an application or hearing with the Office of Administrative Courts (OAC) on any disputed issue. [Resp. Ex. D, Bates stamp 05].

10. The Claimant seeks to obtain a determination that potential hip replacement in the future will be prospectively authorized if an ATP subsequently determines that it will be reasonably necessary at some future, undermined time.

Timely Objection, and Request for Hearing: The Final Admission of Liability

11. The Claimant wrote a letter to the Division of Workers' Compensation (DOWC) on April 25, 2014, objecting to the Final Admission [Claimant's. Ex. 6]. The letter indicates it was copied to the claims representative at Pinnacol Assurance. The ALJ finds that the Claimant's letter constitutes a timely objection to the FAL.

12. Also, on April 25, 2014, the Claimant wrote a letter addressed to DOWC and the OAC in which he requested a hearing in this claim [Claimant's. Ex. 5]. The ALJ notes that this letter was not copied to Pinnacol Assurance. Date stamps on the letter indicate that it was first received by DOWC on May 2, 2014 and by OAC on April 30, 2014. This ALJ finds that the April 25, 2014 letter constitutes a valid and timely notice that the Claimant wished to proceed with a hearing to contest certain portions of the FAL.

13. Because the Claimant had not completed the proper form to request a hearing pursuant to OAC Rules of Procedure (OACRP), Rule 8 (A), 1 CCR 104-1, which requires that the application "...shall be on a form provided by the OAC, or on a substantially similar form," DOWC wrote to the Claimant on May 28, 2014 and explained the deficiency in his pleadings, providing him at that time with the correct form for requesting a hearing [Claimant's. Ex. 7].

14. The Claimant completed the Application for Hearing form and filed it on July 31, 2014 [Claimant's. Ex. 8]. The form reflects that a copy was exchanged with Pinnacol Assurance. The ALJ finds that this Application relates back to the Claimant's timely letter request for a hearing.

15. In the present case, the ALJ finds that the Claimant timely advised the OAC through a written letter received by the OAC on April 30, 2014 that he requested a hearing to contest the April 1, 2014 FAL. Rather than a full rejection by the OAC clerk,

the Claimant was advised in writing that a form application for hearing should be filed. The Claimant completed the form and sent copies of this form to Pinnacol Assurance. The ALJ finds that although the actual form was completed past the thirty day filing deadline, the Claimant was in substantial compliance with the requirements of § 8-43-203 (2) (b) (II) (A), C.R.S., and OACRP, Rule 8 to contest the FAL and have an ALJ determine the disputed issues at a merits hearing.

Ultimate Findings

16. The Claimant was in substantial compliance with the requirements of timely objecting to a FAL and timely requesting a hearing. Consequently, a petition to reopen on the issue of *Grover* medicals is unnecessary.

17. A hip replacement is not presently contemplated by any ATP. Medical providers are of the opinion that a hip replacement will become necessary at some future, undetermined time. Not only is the need for a hip replacement **not** imminent, the idea of a hip replacement is speculative at this point. There is **not** substantial evidence that a hip replacement is a present certainty and reasonably necessary at present, or at a future determinable time. There is no present course of treatment recommended to maintain the Claimant at MMI and to prevent a deterioration of his condition.

18. The medical recommendations in this case are speculative and do not rise to the level of recommendations to cure and relieve the effects of the injury or to prevent deterioration of the Claimant's condition. The Claimant has therefore failed to establish, by a preponderance of the evidence that he is entitled to an award of post-MMI maintenance medical benefits.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Substantial Compliance with Timely Request for Hearing

a. In order to support a finding of substantial compliance with a regulatory mandate, there must be evidence of a genuine effort to comply with statutory requirements. *See Pinon v. U-Haul*, W.C. No. 4-632-044 [Indus. Claim Appeals Office (ICAO), April 25, 2007], *aff'd sub. nom. Pinon v. Indus. Claim Appeals Office* (Colo. App. 07CA0922, April 3, 2008) (NSOP) [substantial compliance requires party intent or to actually make good faith or colorable effort to comply with statutory requirements]. As found, the Claimant's actions under the particular circumstances of this case constitute substantial compliance with the statutory requirement that he request a hearing at OAC within thirty days of the FAL. Although the Claimant's initial letter requesting the hearing

does not reflect that it was copied to Pinnacol Assurance, Pinnacol did receive a copy of the Claimant's objection to the FAL and it was aware of the arguments the Claimant alleged as to why he disputed portions of the FAL.

Credibility: The Reasonable Necessity of a Hip Replacement

b. As found, it is undisputed that a hip replacement is not presently contemplated by any ATP. Medical providers are of the opinion that a hip replacement will become necessary at some future, undetermined time. Not only is the need for a hip replacement **not** imminent, the idea of a hip replacement is speculative at this point. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Future Medical Benefits

c. An award of future medical benefits is proper when there is substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent a deterioration of a claimant's condition. *See Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). As found, there is not substantial evidence to support a determination that hip replacement is reasonably necessary at a future determinable time.

d. If the evidence in a particular workers' compensation case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer greater disability than he has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of injury or to prevent deterioration of a claimant's present condition under the statute requiring the employer to provide medical treatment that is reasonably required to relieve a claimant from the effects of injury. *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992.) To determine this issue, an ALJ must determine whether the medical evidence constitutes substantial evidence that further medical treatment will be reasonably necessary. The ALJ must therefore determine in this case whether substantial evidence has been presented that future hip replacement surgery will be necessary. As found, such a determination at present would be speculative

e. In *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995), the Court of Appeals considered the question of whether evidence of potential for future degenerative changes would suffice to establish the need for future medical treatment as required to support an award of ongoing medical benefits. The Court first concluded that a particular or specific course of treatment need not be anticipated or articulated at the time of the order awarding ongoing medical benefits to workers' compensation claimant. The Court, however, went on to state that before an order for

future medical benefits may enter, there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve workers' compensation claimant from the effects of injury or to prevent further deterioration of his or her condition. The claimant in *Stollmeyer* requested an order for future medical treatment based on medical opinions that there was a chance of degeneration in the ankle in the future which may lead to the need for surgery. The claimant in *Stollmeyer* asked the Court to equate medical evidence indicating the likelihood of future degeneration, for which there was record support, with the need for medical treatment. The Court of Appeals, citing the *Milco Construction* decision, declined to do so, stating: "...This we cannot do. A showing of need for treatment is not met by simply proving that degenerative changes will occur. It is entirely possible that an ALJ, within the exercise of his discretion, could determine that no treatment could prevent or relieve certain types of degeneration. If so, an award of ongoing medical benefits would be inappropriate." *Stollmeyer, supra,* at 611. The facts of the present case are similar to those in *Stollmeyer*. Here, the medical evidence supports a finding that future degeneration is an anticipated consequence of the industrial injury. In the present case, there are no specific recommendations for treatment to cure and relieve the effects of the injury or to prevent deterioration of the Claimant's condition. The only statement regarding future medical treatment is authored by Dr. Hess who stated that the Claimant has arthritis in the hip "...and will someday require hip replacement surgery if he becomes more symptomatic."
As found, the medical recommendations in this case are speculative and do not rise to the level of being recommendations to cure and relieve the effects of the injury or to prevent deterioration of the Claimant's condition.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO, March 20, 2002). *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden with respect to post-MMI maintenance medical benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for post-maximum medical improvement maintenance medical benefits, including hip replacement, are hereby denied and dismissed.

DATED this 22 day of January 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

Claimant's Exhibits 1 through 9, with the exception of a portion of Exhibit 1 concerning a Christo appointment, were admitted into evidence, without objection. Respondents' Exhibits A through W, with the exception of Exhibits U and V which were withdrawn, were admitted into evidence, without objection.

By Procedural Order, dated January 15, 2015, the ALJ established the following briefing schedule: Claimant's opening brief was due, electronically, within 5 days of the Procedural Order, Respondents' answer brief was due, electronically, within 5 days of the opening brief; and, the Claimant's reply brief, if any, was due, electronically, within 2 days of the answer brief. The Claimant's opening brief was filed on January 20, 2015. The Respondents' filed a document entitled "Full Findings of fact, Conclusions of Law and Order," despite the fact that the ALJ has not yet made a decision, on January 26, 2015. Consequently, the document will be construed as the Respondents' answer brief as originally ordered in the above-mentioned Procedural Order. No timely reply brief was filed. Consequently, the matter was deemed submitted for decision on January 29, 2015.

ISSUE

The sole issue designated in both parties Case Information Sheets (CISs) concerns the Claimant's request to overcome the Division Independent Medical Examination (DIME) of Kevin K. Nagamani, M.D., with respect to his determination that the Claimant had reached maximum medical improvement (MMI) on November 27, 2013 [with a scheduled rating of 35% of the left lower extremity (LUE)]. Medical benefits and temporary disability benefits were **not** designated as issues for the October 28, 2014 hearing by either party.

The Claimant bears the burden of proof on the designated issue, by clear and convincing evidence

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant worked as a mechanic for the Employer at the time of the admitted industrial accident of July 4, 2012.

2. The Respondents filed a Final Admission of Liability (FAL), dated June 18, 2014, admitting compensability; an average weekly wage (AWW) of $818.50; temporary disability benefits through November 26, 2013; an MMI date of November 27, 2013; and, scheduled permanent

partial disability of 35% of the LUE, based on the DIME opinion of DIME Dr. Nagamani. The Claimant filed a timely objection and request for hearing to challenge Dr. Nagamani's DIME opinion concerning MMI. The FAL was silent concerning post-MMI medical maintenance benefits.

3. Dr. Nagamani, M.D., was of the opinion that the Claimant reached MMI on November 27, 2014 and he recommended some continued pain management.

4. According to the Claimant, his chronic, severe, and unrelenting pain interferes with essentially all of his activities and precludes him from being able to return to work to support his family, t

5. All of the Claimant's treating physicians have diagnosed probable Complex Regional Pain Syndrome (CRPS), including Brian Beatty, D.O., Stephen Lindenbaum M.D., Benjamin Schnell, M.D., David Hahn, M.D., Robert Guirguis, D.O. and Rasheed Singelton, M.D.

6. Edwin M. Healey, M.D., the Claimant's expert, asserts that the correct diagnosis is CRPS and that the Division of Workers Compensation (DOWC) "Complex Regional Pain Syndrome Medical Treatment Guidelines," as admitted into evidence, provide the guidance as to what testing and treatment ought to be provided for CRPS..

7. The above-referenced DOWC Guidelines for CRPS, page 16, paragraph 3 state:

> "(3) At least one sign at time of evaluation in two or more of the following categories:
>
> -*sensory:* evidence of hyperalgesia (to pinprick) and/ or allodynia (to light touch and/ or deep somatic pressure and/ or joint movement
> - *Vasomotor:* evidence of temperature asymmetry and/ or skin
> color changes and/or asymmetry. Temperature asymmetry
> should ideally be established by infrared thermometer measurements showing at least a 1 degree Celsius difference between the affected and unaffected extremities.
>
> -*Motor/trophic:* evidence of decreased range of motion and/ or motor dysfunction (weakness, tremor, dystonia) and/ or trophic changes (hair,

nail, skin).

(4) No other diagnosis that better explains the signs and symptoms." The evidence in this matter shows that none of the required tests to determine CRPS were performed because the Respondents denied authorization therefore.

8. Apparently, no other diagnosis better explains the Claimant's symptoms than the diagnosis CRPS. The ALJ finds that the DIME physician was in error by establishing the MMI date, based upon an incorrect diagnosis.

9. The DOWC Guidelines for CRPS **require** the following diagnostic testing:

a) A clinical diagnosis meeting the above criteria.

b) At least 2 positive tests from the following categories of
diagnostic tests:

i. Trophic tests

comparative X-rays of both extremities including the distal phalanges

Triple Phase Bone Scan.

iii. Vasomotor/Temperature test-infrared Stress Thermography

iv. Sudomotor test- Autonomic Test Battery with an emphasis on QSART 10. The Claimant's treating physicians clinically diagnosed CRPS but were unable to obtain the required testing by the Respondents. The basis for the treating physician's consensus CRPS diagnosis is rooted in the classical history of a talar dome fracture, followed by surgery, followed by progressive pain, temperature changes and edema leading to the clinical diagnosis of CRPS without reliance on any particular objective testing. The testing that did occur is consistent with CRPS and, apparently, there is no other condition that describes the symptoms as found by objective testing.

10. Contrary to the DIME's opinion, the radiographic testing in this case is consistent with the diagnosis of CRPS. That testing includes a July 13, 2012 X-ray which revealed a fibular closed avulsion fracture, an August 9,2012 CT scan which revealed a 7 mm osteochondral injury to the medial talar dome, a diagnostic arthroscopy on August 28,2012 by Stephen Lindenbaum, M.D. which showed a medial talar dome lesion with a possible depressed fragment or loose body, followed by micro fracture of the talar dome, and an October 30,2012 MRI (magnetic resonance imaging) again showing a talar dome lesion along with marked tears of the peroneal tendons. Dr. Hahn also reviewed x -rays taken on September 9, 2013 and found disuse osteopenia or bone loss in the left ankle. These objective studies alone do not prove CRPS but rather are consistent with the classical history of the CRPS diagnosis.

11. Following diagnostic and therapeutic arthroscopic surgery by Dr. Lindenbaum on August 17, 2012 involving debridement of a cartilaginous injury followed by micro-fracture of the left talar dome, the Claimant suffered recalcitrant symptoms consistent with CRPS. There has been lack of improvement despite conservative care that included sympathetic block injections, opiate pain medications, non- weight-bearing, crutches and restriction from work activities begining on July 5, 2012 and continuing to the present. Because the Claimant's CRPS condition has been resistant to treatment, further studies and a more focused aggressive approach is warranted.

12. In a report dated December 19, 2012 Dr. Lindenbaum stated that before surgery most of the left ankle pain was anterior only but that after surgery [Claimant] pointed to the entire ankle from the medial around to the lateral and poster lateral malleolus as being severely painful. Dr. Lindenbaum stated that he was concerned about doing further surgery and referred the Claimant to David Hahn, M.D., a foot and ankle limb preservation specialist and orthopedic surgeon, for a second opinion.

13. On January 2, 2013 Claimant presented to David Hahn M.D., a board certified orthopedic surgeon. Dr. Hahn was provided the history following the surgery:

> "the patient was placed in a boot, did six weeks of physical therapy but did not improve. Now at this point.., about six months out from his surgery, he complains still of severe pain in his ankle joint, which has begun to radiate to the surrounding parts of his

distal leg and foot. He describes this pain as a sharp pain, sometimes nerve pain, with burning and electrical qualities to it. He also describes being quite hypersensitive to touch as well, pretty much globally in his foot, having difficulty wearing any sort of shoe or sleeping with his foot under the bed sheets at night. He complains of his foot being very cold all of time, despite his efforts to keep it warm. He also notes that there have been some color changes as well. He rates his pain as between 7-8/10. It is made slightly better with Vicodin as well as when he uses his physical therapy TENS unit" (Claimant's Exhibit 2, p. 1).

14. Dr. Hahn's physical examination on January 2, 2013 revealed moderate atrophying of the calf muscle and a left ankle that showed discoloration that envelopes his entire foot". Dr. Hahn described the left foot CRPS symptoms on that date as follows:

"the patient's foot and leg look to me very icy cold in comparison to the contralateral leg which feels normal body temperature. His passive range of motion with this ankle dorsi flexion to about neutral position with about 20 degrees of planter flexion, very minimal inversion and eversion, all limited by pain. His active range of motion is from about -5 degrees dorsi flexion 1 0 t020 degrees of plantar flexion and no inversion or eversion. His light touch sensation appears to be diminished globally below the ankle. His pulses are diminished as well. His posterior tibia pulse is 1 +. The contra lateral side is 2+. I was not able to palpate the dorsal is pedals pulse today"

He notes that he was in a fiberglass cast for approximately 6 weeks following arthroscopic surgery. Thereafter when he came out of the cast he notes that his ankle was very stiff and very difficult to mobilize. He was however able to go to physical therapy but that does not seem to have been terribly helpful to him. Because he continues to have discomfort and lack of function and mobility, he is here today.

I should note that a small osteochondral defect was noted by Dr. Lindenbaum at the surgery and

performed and this was taken care of with debridement and micro fracturing. There is also some history of a fibular fracture which sounds like an undisplaced spiral type fracture which I do not quite understand but seems to have been a problem at one point. The other issue has to do with a fairly recent MRI that showed evidence for peroneal tendinopathy which did not seem to be a problem prior to this incident.

My examination today reveals a left limb that is very cold to palpation. His right leg is nice and warm as one would expect but the left is probably' about 25 degrees cooler than the left and very noticeably so. He has discomfort to palpation of almost every area on his foot and ankle but he does not react in a hysterical manner. He has a mild amount or swelling around his lateral ankle. He has very little motion in the ankle subtalar joints themselves.

After talking to him about his situation and examining his foot and ankle I do feel that his sympathetic nervous system is not functioning appropriately and that I believe is the main cause for his symptoms. "

I also spoke on the phone with Dr. Lindenbaum about the situation and told him that I did not feel that further surgical intervention at this point was indicated. It does not seem as though the patient's ankle is locked but rather just very stiff from a combination of issues. I do think and Dr. Lindenbaum agrees that the sympatheticdystrophy issue is primary importance and that further treatment of that issue is most important and would probably achieve the greatest benefit for this most pleasant gentleman."

15. On January 16, 2013 the Claimant was referred to Rasheed Singe1ton, M.D., a pain management specialist. Dr. Singleton noted on examination that Claimant demonstrated allodynia of his left lower extremity, swelling and coldness to palpation, which are primary symptoms consistent with a diagnosis of complex regional pain syndrome. Other symptoms found by Dr. Singleton at that time consistent with CRPS included, autonomic symptoms, distal swelling, edema and a cold affected extremity with range of motion reduction and muscle strength diminishment. Dr. Singleton assessed

Complex Regional Pain Syndrome and chronic pain syndrome.

16. Dr. Singleton recommended a CRPS series of lumbar sympathetic nerve blocks and CRPS directed physical therapy for strength and conditioning of the left lower extremity. Dr. Singleton stated that Claimant had signs and symptoms of left lower extremity reflex sympathetic dystrophy. Dr. Singleton also recommended a QSART test for THE Claimant's CRPS symptoms including the swelling, edema and coldness found on exam (Respondents' Exhibit C, bate stamp 033). The QSART is a test required by the DOWC guidelines for CRPS. It measures the volume of sweat produced by stimulation. Despite confirmation by. Moshe Lewis, M.D., the Respondents declined to authorize the QSART test. (Claimant's Exhibit 7, February 28, 2013 --Report of Dr. Lewis, page 1-2).

17. At one point Dr. Singleton questioned the diagnosis of CRPS. On his last examination of August 14, 2013, however, Dr. Singelton again confirmed the diagnosis of CRPS. Dr. Singleton found on his most recent physical exam allodynia, swelling, an antalgic gait, weakness, signs of vasomotor, psuedomotor and trophic changes. These signs of vasomotor, psuedo motor and trophic changes are consistent with the DOWC treatment guidelines for CRPS (Respondents' Exhibit C, bates stamp 052).

18. On February 1, 2013 the Claimant returned to Benjamin Schnell, D.O., primary treating physician who also concurred with the diagnosis of CRPS. Dr. Schnell recommended ongoing CRPS directed physical therapy and a series of sympathetic nerve blocks. By this time, none of this was authorized by the Respondents.

19. On April 26, 2013 Dr. Schnell noted that the Claimant presents with symptoms of CRPS and a delayed recovery. It was noted that all treatment and testing for CRPS was stopped and awaiting authorization from the insurance carrier (Respondents' Exhibit H, bates stamp 185,186). The Claimant also complained that he was doing his home exercise program but that his pain was better controlled when he was active in physical therapy. The Claimant expressed that he was very discouraged and worried about his family's financial future. Thereupon, Dr. Schnell referred the Claimant to William Boyd, Ph.D., a clinical psychologist, for his depressed mood. On April 26, 2013 Dr. Schnell noted that except for medications, all treatment was cut off, including Dr. Singleton, physical therapy and additional testing. On his last visit with Dr. Singleton, April 30, 2014, Dr. Singleton again diagnosed CRPS and chronic pain syndrome finding that the Claimant's condition had not changed (Claimant's Exhibit 3 –the April 30, 2014 visit.

20. Because the treating physicians diagnosed CRPS and because the QSART test is designed to detect that condition, on March 4, 2013 Moshe Lewis, M.D., Board Certified in Physical Medicine & Rehabilitation after reviewing the records noted the following history:

> "After the surgery he has had swelling, sweating, and intense pain to the touch at the left foot and ankle .... Clinical findings on 1/24/13 show sensory deficit to pinpoint stimulation throughout
>
> L2-S1. There is allodynia in the left lower extremity with mild swelling and coldness to palpation. The claimant was seen on 2/28/13 noting that the left sympathetic ganglion block did not benefit him significantly. He has chronic pain due to CRPS which is unimproved with conservative management. Now a test for RSD is requested.
>
> REVIEW OUESTION (S):
>
> 1. Is a Qzart Test medically necessary?
>
> Yes, a Qzart Test is medically necessary.
>
> The guidelines support the use of this modality to diagnose the claimant's underlying condition. Therefore, a Qsart Test is medically necessary" (Claimant's Exhibit 7).

21. The Claimant returned to see Dr Guirquis on April 2, 2013. It was noted that the Claimant was still at baseline pain in the left ankle and a second lumbar sympathetic nerve block had been denied by the Respondents as well as physical therapy. The denial of the recommendations by an ATP was prior to a scheduled second opinion Independent medical Exam (IME) appointment. Thereafter on April 17, 2013 the Respondents sent a notice setting and IME with Neil Pitzer, M.D. for June 3, 2013 but the IME actually occurred on July 3, 2013.

22. On April 2, 2013, Dr. Guirguis examined the Claimant and found that the left foot still showed swelling and there was allodynia and that Claimant had chronic intractable chronic pain in the left ankle. Dr. Guirguis diagnosed complex regional pain syndrome and a chronic pain syndrome. Dr. Guirguis opined that chronic opioid therapy may be

continued indefinitely and that Claimant would be reassessed at regular office visits (Claimant's Exhibit 4).

23. On March 12, 2013, the Claimant underwent a comprehensive pain psychological evaluation at the request of William Boyd, Ph.D. The psychological testing of the Claimant revealed that the Claimant's somatization score was close to the average for a pain patient suggesting that he is concerned about and attentive to his health-related problems and symptoms, but somatic issues did not appear to occupy an undue amount of the Claimant's attention and that individuals with a clearly defined organic basis for pain often respond in this manner. Dr. Boyd was of the opinion that although the Claimant was cognitively and emotionally distressed by his physical symptoms, his score suggested that the Claimant has the ability to actively participate in a treatment plan for pain relief without major interference from excessive somatic thought and his level of somatic complaints should not seriously interfere with his treatment program. Dr. Boyd concluded that the Claimant suffered moderate levels of depression and anxiety in response to the stress of his chronic pain, not working and decreased functioning. Dr. Boyd diagnosed a claim related adjustment disorder with anxiety and depressed mood (Claimant's Exhibit 5).

Independent Medical Examination (IME) by Neil Pitzer, M.D.

24. Dr. Pitzer conducted two separate IMEs of the Claimant, at the behest of the Respondents. The first IME was on July 3, 2013, and the second IME on August 28, 2014. On July 3, 2013, Dr. Pitzer's exam found that even mild resistance on strength testing caused significant pain in the Claimant's left foot and ankle and that dystrophic changes were present with mild discoloration of the skin in the left distal foot and ankle area. There was2+ pitting edema to the foot with a markedly abnormal gait. Nonetheless, Dr. Pitzer was the first physician to disagree with the consensus opinion of the numerous treating physicians who diagnosed probable CRPS. Dr. Pitzer recommended anti-inflammatories and knee-high compression stockings along with aggressive pool therapy. Dr. Pitzer also recommended amitriptyline at night for sleep and follow-up with Dr. Lindenbaum to see if additional surgery would be recommended before placing Claimant at MMI. Dr. Pitzer was of the opinion that a more aggressive course of medication management, pool therapy and additional lumbar sympathetic nerve block to rule out a sympathetic component causing CRPS were medically necessary.

25. After the July 3, 2013, exam, Dr. Pitzer recommended further treatment for the Claimant including another lumbar sympathetic block,

an anti-inflammatory for joint pain and swelling, and a knee high compression stocking. He also recommended aggressive pool therapy for independent walking. Dr. Pitzer originally concluded that the Claimant did not have a picture consistent with CRPS, "as the pain is limited to the ankle and proximal foot area and does not involve the hip, knee, proximal calf or toe." The Claimant also had a negative response to lumbar sympathetic blocks and local ankle joint injection.

26. The Claimant underwent a second lumbar sympathetic block on August 23, 2013. Dr. Pitzer performed another exam and reviewed additional medical records on August 28, 2014. By this time, the Claimant had been placed at MMI by Dr. Beatty, undergone the DIME with Dr. Nagamani and an IME by Dr. Healey. Dr. Pitzer noted that the Claimant had diminished sensation from the ankle joint with some numbness along the lateral aspect of the peroneal nerve but he did not demonstrate any allodynia to light touch, no hyperalgesia to pinprick and no pain with light touch throughout the leg. There was no significant dystrophic changes of the hair, skin or nails as compared to the right foot. Dr. Pitzer's observations differ with the observations of several other physicians.

27. Dr. Pitzer noted that his exam was somewhat different than that of the Claimant's medical expert, Dr. Healey, in that Dr. Pitzer did not elicit hyperalgesia to pinprick and there was no allodynia to light touch. Dr. Pitzer again concluded that the Claimant did not meet the physical exam findings for criteria of reflex sympathetic dystrophy (RSD) or CRPS. Dr. Pitzer made the non-medical conclusion that there was a significant component of symptom magnification. Dr. Pitzer agreed with Dr. Nagamani's methodology for the impairment rating by using ankle range of motion. The opinions of Respondents' IME, Dr. Pitzer, are at odds with the consensus opinions of most other physicians, with the exception of DIME Dr. Nagamani's opinions. The ALJ makes a rational choice to accept the opinions of Dr. Healey and the other physicians who diagnosed probable CRPS, and to reject the opinions of Dr. Pitzer as not based on substantial evidence.

28. Dr. Pitzer stated that one of the reasons the Claimant's symptoms are not consistent with a CRPS diagnosis is that the Claimant's pain does not extend beyond the site of his injury. Dr. Pitzer's diagnosis was osteochondral joint pain and disuse atrophy. (Pitzer Depo. Tr. p. 19-20).

29. According to Dr. Pitzer, the Claimant is not a good candidate for a neurostimulator because the Claimant has an undiagnosed

condition (according to Dr. Pitzer). The ALJ finds this observation of Dr. Pitzer to be inconsistent with Dr. Pitzer's opinion supporting DIME Dr. Nagamani's MMI date and the statutory concept that MMI is when a **determinable** medical condition is stable. *See* §8-40-201 (11.5), C.R.S. Dr. Pitzer added that the Claimant is not likely to be a successful candidate for this procedure (Depo. Tr. p. 22). The Claimant has undergone numerous treatments thus far from at least seven separate treatment providers and nothing has relieved his pain (Depo. Tr. p. 22). Dr. Pitzer was unable to make any objective findings consistent with the diagnosis of CRPS during either of his physical exams of the Claimant (Depo. Tr. p 16).

30. When asked about the workers' compensation Medical Treatment Guidelines regarding the diagnosis of CRPS, Dr. Pitzer stated the following:

> I'm not sure that additional testing would be helpful. If we are looking at treatment of CRPS, I do not think it is going to matter in this case. You can never rule out CRPS, you can never rule it in absolutely. It is a nebulous diagnosis with vague diagnostic criteria and that is what the leading pain centers talk about, there is not a good way to rule it in or rule it out.

31. The ultimate opinions of Dr. Pitzer are not credible for the reasons herein above stated.

Additional Medical

32. On August 15, 2014, the Claimant returned to Dr. Lindenbaum, who continued to support the diagnosis of probable Reflex Sympathetic Dystrophy (RSD), recommending more aggressive treatment (Respondents' Exhibit G, bate stamp 124).

33. On August 16, 2013, the Claimant underwent an EMG nerve conduction study, interpreted by John Aschberger, M.D., who noted that there was difficulty in obtaining adequate sensory testing likely due to significant swelling of the left ankle (Respondents' Exhibit D, bate stamp 60).

34. On September 13, 2014, the Claimant presented for a physical therapy (PT) evaluation at Select Physical Therapy. The record from Select PT indicates that the Claimant developed severe stiffness and pain in the left ankle. At that time, the assessed pain level was 8/10 at worst and 6/10 at best. The Range of Motion (ROM) in the left ankle

was markedly restricted on dorsi-flexion
compared to the right. There was moderate to severe edema in the left ankle and foot with tenderness throughout. Strength testing revealed major strength deficiencies of -3/5 to the left foot compared to 5/5 on the right foot (Respondents' Exhibit S, bate stamp 370-371).

35. On September 9, 2013, the Claimant returned to Dr. Hahn who examined the Claimant and observed significant left ankle edema or fluid stiffness and pain. Claimant remained non-weight bearing and used crutches to get around. Dr. Hahn was of the opinion, after a review of x-rays taken on that date, that the Claimant suffered disuse osteopenia or bone loss in the left ankle. Dr. Hahn's continued impression was of a pain syndrome such as RSD and that the Claimant would benefit from treatment of this condition. Dr. Hahn again recommended Allison Franklin, M.D. Dr. Hahn suggested surgery to allow the Claimant to move his ankle more which would give him protection for the purpose of increasing activity levels.

36. On November 21, 2013, the Claimant underwent a functional capacity evaluation (FCE) by Christine Couch, occupational therapist. The evaluation noted that the Claimant demonstrated a consistency of 14 out of 14 tests including the standard J - Mar dynamometer testing, Rapid Grip Exchange and J-mar Maximum Voluntary Effort. Couch noted that the Claimant demonstrated consistency with the two internal consistency measures (Respondents' Exhibit 0, bate stamp 258). The testing revealed deficiencies in sitting, standing and walking without crutches which placed the Claimant and that his overall scores indicate that Claimant perceives himself below the sedentary Work group, below the 5th percentile of employed and unemployed healthy males (Respondents' Exhibit 0, bate stamp 258-262).

Impairment Rating by Brian Beatty, D.O.

37. The Claimant was seen for an impairment rating and discharge evaluation by Brian Beatty, D.O., on November 27, 2013. Dr. Beatty reviewed the records of Dr. Boyd, Dr. Hahn, Dr. Lindenbaum and Dr. Franklin. On examination, Dr. Beatty found an antalgic gain with marked restriction of motion in the left ankle demonstrated by - 10 degrees of dorsi flexion, 30 degrees plantar flexion, 10 degrees inversion and 5 degrees eversion. Dr. Beatty noted that the foot demonstrated diffuse tenderness and swelling, weakness and pain, 1 + edema. Dr. Beatty also noted that the November 21, 2013 FCE revealed that the Claimant could primarily perform seated activities and

limited lifting and carrying because of his inability to bear weight on his left foot.

38. Dr. Beatty listed a diagnosis of closed fibular fracture and provided an impairment rating using the *AMA Guides*, which included a 10 % whole person impairment due to CRPS. Dr. Beatty placed permanent restrictions of primarily seated activities with limited standing and walking. Dr. Beatty recommended that the Claimant receive maintenance medication care for one year (Claimant's Exhibit 6).

39. On follow-up on January 20, 2014, Dr. Beatty noted that the Claimant still required crutches to walk and that there continued to be ongoing swelling of the left foot which was quite cool. Dr. Beatty noted that the Claimant still required Vicodin and recommended an ongoing home exercise program.

Division Independent Medical Examination (DIME) by Kevin Nagamani, M.D.

40. On April 15, 2014, the Claimant underwent a Division Independent Medical Examination (DIME) by Kevin Nagamani, M.D. a general orthopedic surgeon. Dr. Nagamani noted that Dr. Lindenbaum and Dr. Hahn were of the opinion that there was evidence of sympathetic dysfunction in the Claimant's left ankle and that a surgical procedure was unlikely to be beneficial. .

41. Dr. Nagamani noted that a peer review report by Dr. Frank Polanko M.D., dated February 28,2013, sought approval for obtaining a QSART test for the purpose of diagnosing the sweat changes found in clinical exam that were consistent with CRPS. Although the QSART is required according to the DOWC Guidelines for CRPS, Dr. Nagamani failed to comment on the failure to authorize the QSART. Based on this failure, the ALJ infers and finds that Dr. Ngamani is not knowledgeable about the DOWC Guidelines regarding CRPS nor does he have an understanding of the significance of the QSART test.

42. Dr. Nagamani examined Claimant and found that the Claimant keeps his foot in a plantar flexed position when walking with crutches; that Claimant had only an active dorsiflexion to -5 degrees on the left with full dorsi flexion on the right. With regard to inversion and eversion; that the Claimant had only about 5 degrees of active motion. Active strength testing was diminished in all directions with give way with resisted movements, presumably due to pain. Dr.

Nagamani assessed left ankle osteochondral lesion at the talus sustained as a result of the compensable work related injury of July 4, 2012 with chronic pain and disability of the ankle. Using the *AMA Guides to Evaluation of Permanent Impairment,* 3rd Ed. Rev., Dr. Nagamani assigned a 35 % impairment of the lower extremity, and due to a normal EMG study, Dr. Nagamani rendered anionopine that no neurological dysfunction would apply. Dr. Nagamani converted the 35% impairment of the lower extremity to a 14 % whole person impairment (*See* Respondents' Exhibit A).

43. Dr. Nagamani concurred with Dr. Beatty that November 27, 2013 was the date of MMI. Dr. Nagamani indicated that it was difficult for him to establish a firm diagnosis because the Claimant did not respond to the sympathetic nerve blocks or EMG yet from a physical exam there were demonstrated signs of CRPS that certainly explains his condition today. Dr. Nagamani stated the following opinion:

> *"clearly there* is some *pain syndrome involved in claimant's condition; however I do not feel comfortable assigning a diagnosis of complex regional pain syndrome based on his poor response to sympathetic block as well as lack of objective testing to support the diagnosis* ".

44. Dr. Nagamani prescribed permanent restrictions of only sedentary work, concurring with the limitations stated in the FCE. Dr. Nagamani gave the following work restrictions: of a job that is at a minimum 80% seated with no more than 20% ambulation as appropriate with no standing or ambulating of more than 5 minutes at a time. Dr. Nagamani noted that the Claimant had responded poorly to conservative measures other than pain management.

Claimant's Independent Medical Examination (IME) by Edwin M. Healey, M.D.

45. On July 15, 2014, the Claimant underwent an IME with Edwin Healey, M.D., board certified in Occupational Medicine/Neurology and Pain Medicine, at the behest of the Claimant. Dr. Healey disagreed with the conclusions of Dr. Nagamani. In particular, Dr. Healey was of the opinion that the Claimant sustained CRPS and that the Claimant was permanently and totally disabled unless he has significant

improvement of his symptoms and function (*See* Claimant's Exhibit 1, p. 23).

46. Dr. Healey testified on October 28, 2014 and provided his twenty two page report along with Rule 17, Exhibit 7, "Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy" DOWC Medical Treatment Guidelines, and an article entitled "Demystifying CRPS: What Clinicians Need to Know", all of which were admitted into evidence. Dr. Healey noted that Claimant's medical findings met all the requirements of the DOWC Guidelines stating that Claimant meets the requirements of the DOWC Medical Treatment Guidelines as follows:

> "The requirements of the DOWC at the time of evaluation include the following: Sensory evidence of hyperalgesia to pinprick and/ or allodynia to light touch or deep somatic pressure and joint movement; he meets these criteria; vasomotor evidence of temperature asymmetry and/ or skin color changes and symmetry; pseudo motor edema; evidence of edema and/or sweating changes or sweating asymmetry; motor or trophic changes including evidence of decreased range of motion and motor dysfunction with weakness and, finally, no other diagnosis that would better explain the signs and symptoms." (*See* Claimant's Exhibit 1 p. 20).

Dr. Healey is of the opinion that the Claimant meets all four criteria as documented by various medical providers during his clinical course.

47. Dr. Healey states that there is no definitive test that exists for CRPS. The diagnosis must be made by exclusion (Claimant's Exhibit 1, p. 20). The hallmark of diagnosis is thorough clinical evaluation of symptoms and signs. Testing, however, including EMG or nerve conduction testing to rule out peripheral neuropathy; MRI and x-rays to identify soft tissue trauma or bone disorders can be helpful; pseudo-motor testing such as QSART to assess resting and provoked sweat output of the painful versus unaffected limbs may indicate abnormal sympathetic activity (disturbances in blood flow). QSART is also helpful in identifying allodynia which is a symptom

common to CRPS and which was consistently found on the examinations of the various treating physicians in this case (*See* article, "Demystigying CRPS", Claimant's Exhibit 1, p. 52)

48. Dr. Healey is of the opinion that under diagnostic components needed to confirm CRPS, that even though the medical treatment guidelines require specific positive testing, that the consensus of the academic pain community is that CRPS is a clinical diagnosis rather than dependent on specific tests as required by the DOWC. Every single treating physician in this case diagnosed Claimant as suffering from an industrial accident causing CRPS. Those physicians include Dr. Schnell, Dr. Beatty, Dr. Singleton, Dr. Lindenbaum and Dr. Hahn. Even the insurance carrier's peer review pain expert, Dr. Moshe Lewis, agreed a QSART test was medically necessary for Claimants CRPS. Dr. Lewis stated: "The claimant was seen on 2/28/2013 noting that the left sympathetic ganglion block did not benefit him significantly. He has chronic pain due to CRPS which is unimproved with conservative management. Now a test for RSD is requested.

49. With respect to diagnostic testing, Dr. Healey states:

> "In regards to testing, it is required that tropic tests including comparative x-rays of both extremities including distal phalanges or a triple-phase bone scan be done. Neither of these tests have been done: however, the x-rays of his left ankle indicates osteoporosis. Other testing includes a vasomotortemperature test with infrared stress thermography. This has never been done by any of this treating physicians. Another test, recommended by the peer review consultant for the insurance company, was a pseudo motor test with autonomic battery with emphasis on QSART; that test has never been performed" (Claimant's Exhibit 1, p. 20).

50. Dr. Healey commented on the Claimant's negative responses to the sympathetic blocks as follows:

> "There is no statement regarding sympathetic blockade. It should be noted that not all people who have complex regional pain syndrome do respond to sympathetic blockade. This is well known, again,

in the pain community. Therefore, the fact that he did not have significant pain relief with sympathetic nerve blocks does not rule out the diagnosis of complex regional pain syndrome". Also see article "Demystifying CRPS: What Clinicians Should Know", page 53, where a study found only one-third of patients undergoing sympathetic nerve blocks obtained complete relief of symptoms" (Claimant's Exhibit 1).

51. Rather, Dr. Healey supported the diagnosis of CRPS as a clinical diagnosis that had all the signs and symptoms from all the visits to the treating physicians. In this regard Dr Healey states the following opinion:

> "[Claimant] presents with a classical history of complex regional pain syndrome with a talar dome fracture, followed by surgery, followed by progressive pain, temperature changes and edema. His initial treating physicians opined that his problem was probably complex regional pain syndrome. This has been questioned by Dr. Pitzer, and at one point by Dr. Singleton; however, in his last notes Dr. Singleton continues to maintain that [Claimant] has complex regional pain syndrome and I concur with his opinion" (Claimant's Exhibit 1, p. 20).

52. Dr. Healey's physical exam included:

> "Examination of the left ankle and foot reveals 1 + edema. There is a noticeable difference in temperature between his left ankle and foot and his right ankle and foot in that his left foot and ankle are extra ice cold to palpation. Even light palpation of his left ankle and foot causes complaints of severe pain and withdrawal. He notes decreased light touch, but there is hyperalgesia with pinprick testing involving the left ankle and left foot up to the medial malleolus and lateral malleolus. Motor testing is not possible due to the fact that any attempt to bear weight or heel or toe walk he is not able to perform due to complaints of stiffness and pain in his left ankle. The pain elicited on palpation

is diffuse and involves the medial lateral and dorsal ankle and plantar foot. He has markedly decreased range of motion of his left ankle, with 5 degrees of dorsi flexion, 10 degrees of plantar flexion, 3 degrees of eversion and inversion."

53. Dr. Healey diagnosed: "complex regional pain syndrome type 1, rule out central sensitization pain syndrome" (Claimant's Exhibit 1, p. 20).

54. Dr. Healey asserts that the Claimant's CRPS has been:

" recalcitrant to treatment, including sympathetic nerve blocks and medications which he has had difficulty tolerating. He has undergone psychological counseling but continues to be depressed and anxious over his chronic, severe, unrelenting pain that interferes with essentially all activities and precludes him from being able to return to work to support his family."

55. With respect to Dr. Nagamani's DIME opinion, Dr. Healey states:

"Dr. Nagamani, appeared to equivocate in his report as to whether or not [Claimant] had complex regional pain syndrome but had no other explanation for it, and he notes that he had a normal

EMG/nerve conduction velocity, which is not uncommon with complex regional pain syndrome since the pain fibers, the A -delta and unmyelinated C fibers are small fibers and frequently will not be positive with an EMG/ nerve conduction velocity test; therefore, it is irrelevant whether or not he had a positive EMG/ nerve conduction velocity test of his left lower extremity for making the diagnosis of complex regional pain syndrome."

56. Dr. Healey questions Dr. Nagamani's familiarity with the DOWC CRPS diagnostic guidelines. As Dr. Healey states in his report:

There is not documentation or evidence of

> familiarity by Dr. Nagamani with DOWC CRPS diagnostic guidelines which include a triple-phase bone scan, x-rays, infrared stress thermography and pseudo motor Qsart testing, which are additional tests required in order to make the diagnosis. Therefore, I do not find Dr. Naganami's opinion credible because he does not appear in his report to have in-depth knowledge of complex regional pain syndrome or the medical treatment guidelines promulgated by the Division of Workers' Compensation on complex regional pain syndrome. It should be noted that lumbar sympathetic nerve blocks are not part of the required diagnostic criteria promulgated by the Division of Worker's Compensation, and this appears to be one of the major reasons that Dr. Nagamani did not agree with the treating physicians that [Claimant] has complex regional pain syndrome."

57. For the treatment of Claimant's CRPS, Dr. Healey recommended a trial of spinal cord stimulation for his left lower extremity CRPS as well as aggressive treatment of his chronic pain with opioids, which [Claimant] may need indefinitely. In addition Claimant is having problems with depression. Dr. Healey recommends anti-depressants and ongoing psychological counseling concurring with Dr. Singletons' recommendation for additional physical therapy and water therapy.

58. Dr. Healey also is of the opinion that the Claimant may have a chronic centralized pain disorder as described on page 5 under C. Introduction to Chronic Pain in Rule 17, Exhibit 9, DOWC Chronic Pain Disorder Medical Treatment Guidelines. Central pain is recalcitrant to treatment but may be significantly improved with high dose opioid medication.

59. Regarding Impairment, Dr. Healey is of the opinion that the Claimant is not at MMI. Dr. Healey states that the Claimant can stand and walk only on level surface using a crutch without bearing weight on left lower extremity. Dr. Healey concluded that under the facts of this case as follows:

The Claimant's Testimony

60. The Claimant testified at the hearing of October 28, 2014. He that he has not been able to walk without crutches since the date of the initial injury, despite the treatment offered herein. He is severely limited in his ability to bend, stoop, or pick anything up anything off the floor because he cannot stand on his left foot and cannot balance on his right foot. He can stand for approximately 4-5 minutes before needing to sit for approximately 15 minutes, at which time, he can stand again. After walking a short distance, the Claimant needs to sit and rest for approximately 15 minutes to give his aching left shoulder and right knee a break, at which time he can get back up and walk. He can't kneel or crouch or twist while using his crutches. He can drive for approximately half an hour before needing to take a fifteen minute break. In addition, The Claimant feels constant, severe pain in his left ankle which swells and freezes up. Claimant has very little range of motion in his left ankle and has trouble moving it. The ALJ finds the Claimant's testimony credible and un-refuted.

61. The Claimant testified to his daily routine. He has three children that he takes and picks up from school. With the assistance of his wife and his children, and because he is able to take breaks and sit as needed, he is able to help his children get snacks, do their homework and get ready for bed. When his pre-school child takes a nap in the middle of the day, he gets on coloradojobdepartment.com web site and searches for work. He has trouble playing with his children and can't do anything that requires putting pressure on his left foot. Claimant is not unemployed because he isn't motivated to take care of his family, he is unemployed because he has a severely painful CRPS condition which completely disables him from regular employment.

Ultimate Findings

62. The ALJ finds the Claimant's presentation and testimony credible, contrary to Respondents' IME Dr. Pitzer's psychological opinions. Further, the ALJ finds the opinions of all the physicians who indicate that the Claimant probably has CRPS and that a QSART Test is warranted are more credible than the opinions of Dr. Pitzer and DIME Dr. Nagamani.

63. Between conflicting medical opinions, the ALJ accepts the opinions of Dr. Healey and the other physicians who indicate that the Claimant may have CRPS and rejects the opinions of Respondents' IME Dr. Pitzer and DIME Dr. Nagamani. It is insufficient, however, to simply reject DIME Dr. Nagamani's opinion on MMI. It must be shown that it is highly probable, unmistakable and free from serious and substantial doubt that Dr.

Nagamani's opinions are erroneous.

64. Dr. Nagamani, the DIME physician, misdiagnosed the underlying medical condition of the Claimant when he failed to assign the diagnosis of CRPS disorder to this case. Dr. Nagamani's report itself demonstrates that the he was unfamiliar with both the diagnosis and treatment of CRPS but also the DOWC CRPS Medical Treatment Guidelines. The basis of his opinion was either the lack of response to EMG testing or sympathetic block injections, both tests which cannot rule out CRPS. The one test that was required by the DOWC Guidelines, the QSART, was never addressed in the DIME's report, even though the Respondents' own peer review expert, Dr. Lewis, agreed that this test should be performed. As Dr. Healey stated, Dr. Nagamani's opinion lacks credibility because he did not appear, in his report, to have an in-depth knowledge of CRPS or the Medical Treatment Guidelines promulgated by the DOWC. For example, even though Dr. Nagamani stated that the Claimant clearly had the signs and symptoms of CRPS, he did not feel comfortable in assigning an impairment rating because of the lack of positive response to the sympathetic nerve blocks and any objective testing. This statement reveals that Dr. Nagamani's opinion is not based on substantial evidence and that it is clearly erroneous. Additionally, Dr. Nagamani did not mention the objective tests required by the DOWC Guidelines.

65. As found, herein above, the Claimant has proven that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Nagamani's opinion that the Claimant reached MMI on November 27, 2013 is erroneous. As Dr. Healey observed, Dr. Nagamani ignored accepted tests for CRPS, including the QSART Test.

66. The issues of medical benefits, AWW and temporary disability benefits were **not** designated as issues. Therefore, the Respondents had not received advance notice of these issues. Thus, they were not afforded a meaningful opportunity to be heard on these issues at the October 28, 2014 hearing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's presentation and testimony was credible, contrary to Respondents' IME's, Dr. Pitzer's,

credibility opinions. Further, the opinions of all the physicians who indicated that the Claimant probably has CRPS, and that a QSART Test is warranted, are more credible than the opinions of Dr. Pitzer and DIME Dr. Nagamani.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ accepted the opinions of Dr. Healey and the other physicians who indicated that the Claimant may have CRPS and rejected the opinions of Respondents' IME Dr. Pitzer and DIME Dr. Nagamani. It is insufficient, however, to simply reject DIME Dr. Nagamani's opinion on MMI. It must be shown that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. Nagamani's opinions are erroneous.

Maximum Medical Improvement (MMI)

c. MMI is defined as the point in time when any medically **determinable** physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment. As found, the QSART test was recommended to definitively determine if the Claimant has CRPS and, thus, what a proper course of treatment for it would be. *See*

In the Matter of the Claim of William Soto, Claimant, W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. .As found, the Claimant has overcome DIME Dr. Nagamani's opinion that the Claimant is at MMI.

Overcoming the DIME of Dr. Nagamani

d. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, Dr. Nagamani, the DIME physician, misdiagnosed the underlying medical condition of the Claimant when he failed to assign the diagnosis of probable CRPS disorder to this case. Dr. Nagamani's report itself

demonstrates that the he was unfamiliar with both the diagnosis and treatment of CRPS but also the DOWC CRPS Medical Treatment Guidelines. As found, the basis of his opinion was either the lack of response to EMG testing or sympathetic block injections, both tests which cannot rule out CRPS. The one test that was required by the DOWC Guidelines, the QSART, was never addressed in the DIME's report, even though the Respondents' own peer review expert, Dr. Lewis, agreed that this test should be performed. As Dr. Healey stated, Dr. Nagamani's opinion lacked credibility because he did not appear in his report to have an in-depth knowledge of CRPS or the Medical Treatment Guidelines promulgated by the DOWC. For example, even though Dr. Nagamani stated that the Claimant clearly had the signs and symptoms of CRPS, he did not feel comfortable in assigning an impairment rating because of the lack of positive response to the sympathetic nerve blocks and any objective testing. This statement reveals that Dr. Nagamani's opinion is not based on substantial evidence and that it is clearly erroneous. Additionally, Dr. Nagamani did not mention the objective tests required by the DOWC Guidelines.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has overcome the Division Independent Medical Examiner's (Kevin Nagamani, M.D.) opinion that the Claimant reached maximum medical improvement on November 27, 2013, by clear and convincing evidence.

B. The Claimant has not yet reached maximum medical improvement.

C. Any and all issues not determined herein, including medical benefits, average weekly wage and temporary disability, are reserved for future decision.

DATED this 29 day of January 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of the portion of a proposed decision concerning compensability to counsel for the Claimant to be submitted, electronically, within 5 working days, giving counsel for the Respondents 2 working days after receipt thereof to file electronic objections as to form. The ALJ referred the portion of the proposed decision concerning penalties to counsel for the Respondents to be filed , electronically, within 5 working days, giving Claimant's counsel 2 working days within which to file objections. The portion of the proposed decision concerning compensability was filed on January 13, 2015. The portion concerning penalties was filed, electronically, on the same date. No timely objections were filed by either party. After a consideration of the two portions of the proposed decision, the ALJ has synthesized and modified them and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability of injuries sustained in an automobile accident on October 7, 2013, specifically, were the injuries sustained as a result of the motor vehicle accident (MVA) in the course and scope of employment and arising out of employment; medical benefits; and, penalties versus the Respondents, pursuant to § 8-43-304(1), C.R.S., because the insurance carrier allegedly did not file a timely Notice of Contest for alleged failure to timely admit or contest liability.

At the conclusion of the Claimant's case-in-chief, the Respondents moved for judgment in the nature of a directed verdict. After hearing the arguments of counsel, the ALJ granted the Respondents' motion for judgment in the nature of a directed verdict.

The Claimant bears the burden of proof on all issues by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

General Finding

1. The parties stipulated and the ALJ finds that the Claimant's average weekly wage (AWW) is $703.03.

Compensability –The Claimant's Job Duties

2. The Claimant worked as a Regional Supervisor for the Employer and supervised five branches in Colorado and three branches in Utah.

3. The Employer provided the Claimant with a company vehicle to travel to each branch and the Employer paid for the vehicle and the gasoline. The Employer also provided the Claimant with a company cell phone.

4. The Claimant was paid a salary and did not need to clock in and out of work. She was expected to be available to take care of any issues that arose with any of the branches, such as if the security alarm went off, if a computer went down at a branch, or if an employee called in sick.

5. The Claimant's job duties included, hiring and firing associates for each branch, setting up the associates schedules, training new associates, and traveling daily to the branches to provide them with supplies.

6. The Claimant has a work office set up at her home with a computer to address work issues throughout the day. The Claimant also keeps work supplies at her home to distribute to the different branches that need supplies.

7. The Claimant's regular schedule is to wake up in the morning and to check her cell phone, from home, to determine if she has received any emails or phone calls from work to which she would needed to respond. The Claimant is responsible to make sure that all the employees at each branch are working, or to get another employee to cover the shift, if needed. She is expected to check the security emails to make sure each branch has opened. Then the Claimant is expected to drive to each branch to supervise, train the associates, and bring them any supplies they need.

8. As part of her job duties, the Claimant was suppose to travel to five Colorado branches and three Utah branches to bring work supplies, to train associates and to cover shifts when associates were sick. On October 7, 2013, when she was involved in the car accident, she was traveling to the Commerce City branch to cover a shift.

Compensability – The Injury Incident

9. On October 7, 2013, the Claimant woke up around 6:30 or 7 AM and picked up her cell phone and responded to work emails. Her plan that day was to drive to the Aurora branch which was located at 1450 Havana Street in Aurora, Colorado to drop off supplies for the branch, and then drive to the Commerce City branch to cover a shift.

10. While heading north on I-225, toward the Aurora branch, the Claimant changed her mind and remembered she had already gone to the Aurora Branch on October 4, 2013, so she did not need to go to that branch that day. Therefore, she stayed on northbound I-225, in order to head to the Commerce City branch which was located at 5640 East 64th Avenue, Commerce City, Colorado.

11. While on northbound I-225, the Claimant was trying to get onto westbound I-70, to head to the Commerce City branch, when she was hit by a semi-truck (T-boned) [Claimant's Ex. 7 pp. 17-18].

12. At the time of impact, the airbags erupted and the Claimant hit her head, neck, left shoulder, left arm, back, and left leg.

13. The Claimant was given a company cell phone, and on the morning of October 7, 2013 she checked her work emails and voice messages, and responded to work emails from home. The Claimant then, got into the company provided vehicle, and planned to take supplies to the Aurora branch. As she was driving, she changed her mind and decided to drive to the Commerce City branch to cover a shift when she was involved in a car accident injuring her head, neck, left shoulder, arm, back and left leg. Therefore, her official work duties began that morning at home.

Medical –Emergent Care

14. The Claimant was taken by ambulance with Rural/Metro of Central Colorado, to the University of Colorado Hospital (Claimant's Ex. 8 p. 30).

15. On October 7, 2013, Michael C. Overbeck, M.D., at the University of Colorado Hospital noted that the Claimant was in a motor vehicle collision and had pain in her head, neck and left hip. On physical examination, he noted positive for neck pain, back pain, laceration on her head and left arm and left leg pain (Claimant's Ex. 11 pp. 79-80).

16. On October 7, 2013, Dr. Overbeck recommended an x-ray of the Claimant's cervical spine, pain management and laceration repair (Claimant's Ex. 11 p. 95).

17. On October 7, 2013, Jeremy Voros, M.D., a resident at the University of Colorado Hospital, recommended for the Claimant to be off of work for three days (Claimant's Ex. 11, p. 96).

18. On October 7, 2013, the Claimant called and reported the injury to her supervisor, Jose Estrada, who is the Regional Director.

19. On October 9, 2013, Dr. Overbeck, performed a laceration repair at the University of Colorado Hospital (Claimant's Ex. 11, p. 103).

20 On October 11, 2013, Dr. Ryan, a resident at the University of Colorado Hospital, removed the sutures from the laceration (Claimant's Ex. 11, p. 114).

Medical –Authorization and Treatment

21. The Employer referred the Claimant to Concentra.

22. On October 11, 2013, Robert J. Dixon, M.D., at Concentra, who became the Claimant's authorized treating physician (ATP), noted that the Claimant was in a motor vehicle accident and she hit her left forehead, left chest and has pain in her neck, left shoulder, left arm and lower back. He noted on physical exam that she had tenderness in her neck, thoracic area, lumbar area, and left upper arm. (Claimant's Ex. 13 pp. 123-124)

23. On October 11, 2013, Dr. Dixon recommended a CT scan of the Claimant's head, physical therapy (PT) of her neck and back, and he assessed that it was "Greater than 50% likely work related" (Claimant's Ex. 13 p. 125). The ALJ infers and finds that Dr. Dixon has expressed an opinion that to a reasonable degree of probability that the Claimant's injury was work-related. Nonetheless, the determination of compensability rests on the Claimant's job duties as of the time of the accident and the fact that she had entered into the course and scope of employment as of the time she left home. Therefore, the Claimant's was not "going to" work (outside the course and scope). She was already working at the time of the accident.

24. On October 11, 2013, Dr. Dixon recommended no lifting over 10 pounds, and no pushing and/or pulling over 20 pounds (Claimant's Ex. 13 p. 126).

25. The Claimant received PT and Dr. Dixon referred her to Alison Fall, M.D., for further medical treatment.

26. On March 24, 2014, Dr. Fall noted that the Claimant was at maximum medical improvement (MMI) and gave her a zero percent impairment rating (Claimant's Ex. 15, p. 245).

27. On December 10, 2014, John S. Hughes, M.D., performed an independent medical examination (IME) at the Claimant's behest, and he was of the opinion that the Claimant injured her head, chest, neck, upper back and lower back in the MVA, and he recommended that the Claimant needed a non-contrast MRI (magnetic resonance imaging) of her cervical and thoracic spine regions (Claimant's Ex. 16 p. 249).

Penalties

28. After the MVA, the insurance carrier promptly and continually paid for the Claimant's medical treatment as a result of the MVA up to and including the April 25, 2014 date of MMI. The Claimant was placed at MMI on April 25, 2014 by John Burris, M.D., and was discharged from care with no permanent impairment, no work restrictions, and no medical maintenance care recommended.

29. As a result of her injuries, the Claimant only missed three days of work for which she was paid in full by Employer: October 7, 8, and 9, 2013.

30. On June 2, 2014, the Claimant's counsel, Ms. McClure, completed a Worker's Claim for Compensation on behalf of the Claimant, which was then entered by the Division of Workers' Compensation (hereinafter "DOWC") on June 9, 2014.

31. At the hearing, the Claimant alleged that the insurance carrier was required to either admit or deny liability within twenty days of the filing of the Workers' Claim for Compensation pursuant to § 8-43-203(1) (a), C.R.S. On August 7, 2014, Paul Tauriello, Director of the DOWC, issued an Order requiring the insurance carrier to submit an Admission of Liability or Notice of Contest within fifteen days of the date his Order was mailed. The Respondents timely filed a Notice of Contest on August 19, 2014, pursuant to Director Tauriello's Order. Apparently, the Claimant's theory is that Director Tauriello' order retroactively bootstrapped an obligation for the respondents to admit or contest in the past tense. This theory is rejected by the ALJ.

32. In her August 6, 2014, Application for Hearing, the Claimant endorsed § 8-43-304(1), C.R.S., as the applicable penalty provision, seeking penalties of up to $1,000 per day from the time the admission/denial was allegedly due to when the admission/denial was filed.

33. After the Claimant rested her case-in-chief, the Respondents moved for a ruling in the nature of a directed verdict on the issue of penalties.

Ultimate Findings

34. The Claimant presented and testified credibly. Specifically, the ALJ finds the Claimant credible when she testified at hearing that she was heading to the Aurora office but changed her mind and diverted to start heading to the Commerce City Office by starting to get onto the ramp from I-225 to I-70, where the MVA occurred.

35. The Claimant's has proven, by a preponderance of the evidence that the MVA of October 7, 2013 was in the course and scope of her employment and arose out of it. Therefore, the Claimant sustained compensable injuries as a result of the MVA. Travelling from branch to branch was contemplated by the implicit contract of the

Claimant's employment. Also, going from branch to branch created a "special zone of danger," as opposed to merely going from home to the office.

36. The Claimant has proven, by preponderant evidence that all of her medical care and treatment was authorized, within the chain of authorized referrals, of an emergent nature, causally related to the injuries sustained in the MVA and reasonably necessary to cure and relieve the effects thereof. The medical causality opinions are undisputed.

37. As an academic matter at this point in time, the Claimant's AWW is $703.03.

38. The Claimant failed to prove, by a preponderance of the evidence entitlement to penalties against the respondents for alleged failure to timely admit or contest because the Claimant was temporarily disabled for three (3) days or less, and the Respondents were not legally obliged to admit or contest. As found, the Respondents paid medical benefits without taking a position, which they were allowed to do under the Workers Compensation Act (hereinafter the "Act").

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions

(this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the medical causality opinions are, essentially, undisputed. As further found, the Claimant was credible in her testimony concerning the nature of her job duties, and her testimony in this regard was, essentially undisputed. Consequently, the Claimant's testimony supports the fact that her MVA was in the course and scope of her employment and arose out of it. Therefore, it supports compensability of her injuries.

Compensability

b. The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n of Colorado v. Jones,* 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra.* As found, the Claimant's injuries arose out of and were within the course and scope of her employment.

c. Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Indus. Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). As found, the Claimant's MVA necessitated medical treatment. Therefore, her injuries were sufficient to be compensable.

d. The general rule is that injuries sustained by employees going to and from work are not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 212 (Colo. 1967). An exception to this general rule exists when "special circumstances" create a causal relationship between the employment and the travel, beyond the sole fact of the employee's arrival at work. *Madden v. Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). The courts have listed four factors which are relevant in determining whether "special circumstances" have been established which create an exception to the "going to and coming from" rule. The factors are:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Madden v. Mountain West Fabricators, *id.* As found, travel was contemplated by the Claimant's implicit employment contract. The Claimant's travel on October 7, 2013 was at the Employer's express or implied request and such travel conferred a benefit on the Employer beyond the sole fact of the employee's arrival at work. *See Electric Mutual Liability Insurance Co. v. Indus. Comm'n,* 154 Colo. 491, 391 P.2d 677 (1964). As found, the Claimant was given a company cell phone, and on the morning of October 7, 2013 she checked her work emails and voice messages, and responded to work emails from home. The claimant then, got into the company provided vehicle, and planned to take supplies to the Aurora branch. As she was driving, she changed her mind and decided to drive to the Commerce City branch to cover a shift when she was involved in a car accident injuring her head, neck, left shoulder, arm, back and left leg. Therefore, her official work duties began that morning and it is found she was within the course and scope of employment when she was involved in the MVA. The Claimant's travel to the different branches was contemplated by her employment contract and a substantial part of the service to the Employer. As part of her job duties, the claimant was suppose to travel to five Colorado branches and three Utah branches to bring work supplies, to train associates and to cover shifts when associates were sick. On October 7, 2013, when she was involved in the car accident, the claimant was traveling to the Commerce City branch to cover a shift. Claims have been deemed compensable when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work. *See Electric Mutual Liability Insurance Co. v. Indus. Comm'n*, 154 Colo. 491, 495, 391 P.2d 677, 679 (1964) [holding that when an employee uses his own car to perform services for or at the direction of his employer, the employee remains in the course of his employment until he returns home].

e. Furthermore, as found, the Employer provided the company vehicle and also paid for the gasoline. Claims have also been compensable when the employer provides

transportation or pays the cost of the employee's travel to and from work. *See Indus. Comm'n v. Lavach*, 439 P.2d 359 (Colo. App. 1968). As ultimately found, the Claimant has prove that she was within the course and scope of employment on October 7, 2013 when she was involved in the car accident injuring her head, neck, left shoulder, arm, back and left leg.

Medical

f. As found, the claimant went to the ER at the University of Colorado Hospital where Dr. Overbeck recommended x-rays, pain management, laceration repair and she was put off of work for three days. § 8-42-101(1) (a), C.R.S., provides:

> Every employer ... shall furnish ... such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury ... and thereafter during the disability to cure and relieve the employee from the effects of the injury.

g. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the ambulance and ER at the University of Colorado Hospital was emergent care, exempt from the specific medical authorization requirements.

h. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to her injuries sustained in the MVA of October 7, 2013. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment as reflected in the evidence was and is reasonably necessary.

i. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all of the Claimant's medical care and treatment for the injuries sustained in the MVA of October 7, 2013 was within the authorized chain of referrals.

Average Weekly Wage (AWW)

j. It was stipulated and found that the Claimant's AWW is $703.03.

Penalties

k. When a tribunal is the trier of fact, a motion for a "directed verdict" is actually a motion to dismiss pursuant to C.R.C.P. 41(b). *Campbell v. Commercial Credit Plan, Inc.*, 670 P.2d 813 (Colo. App. 1983). Under C.R.C.P. 41(b) (1), after a plaintiff in a civil action tried without a jury has completed the presentation of the evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. *Romero v. Tristar Drywall, Inc.*, W.C. No. 4-745-833 [Indus. Claim Appeals Office (ICAO), May 24, 2010]. A motion for a directed verdict is an appropriate procedural step to test the sufficiency of a party's case in a workers' compensation proceeding. *Romero v. Tristar Drywall, Inc.*, *supra*; *see also* Office of Administrative Courts (OACRP), Rule 2 (B), 1 CCR 104-1 (stating the Colorado Rules of Civil Procedure apply to Workers' Compensation hearings unless they are inconsistent with these rules and the provisions of the Workers' Compensation Act). The tribunal is not required to view the evidence in the light most favorable to the plaintiff. *Rowe v. Bowers*, 417 P.2d 503 (Colo. 1966); *Blea v. Deluxe/Current, Inc.*, W.C. Nos. 3-940-062, 4-279-268 (ICAO, June 18, 1997) [applying these principles to workers' compensation proceedings]. Rather, the test is whether in light of all the evidence, judgment should be entered for the movant. *Smith v. Weindrop,* 833 P.2d 856 (Colo. App. 1992); *Campbell v. Commercial Credit Plan, Inc.*, *supra*; *Blea v. Deluxe/Current, Inc.*, *supra.* As found, the Claimant's evidence could not get any better as of the conclusion of her case-in-chief and she had not established entitlement to penalties by a preponderance of the evidence. Therefore, it was appropriate to grant the Respondents Motion for Judgment in the nature of a Directed Verdict on the issue of penalties for alleged failure to timely admit or contest.

l. Penalties under § 8-43-304 (1), C.R.S. can be assessed for violations of the Colorado Workers' Compensation Act ("the Act") where there is no other penalty provision provided or for violating a Director's Order. The statute provides:

> Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates any provision of articles 40 to 47 of this title, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be subject to such order being reduced to judgment by a court of competent

> jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each such offense.

§ 8-43-304(1), C.R.S. is not a legal remedy available to a claimant. If penalties were available to the Claimant, they would be limited to § 8-43-203(1) (a), C.R.S.

As found, the Claimant requested that the ALJ grant her an award of penalties under § 8-43-304 (1), C.R.S., for the insurance carrier's alleged late filing of a Notice of Contest. Nevertheless, § 8-43-203 (1) (a) and § 8-43-203 (2) (a), C.R.S., establish the only penalty provision that could be applicable. Because the Claimant is not legally entitled to relief under the statute she cited, no relief should be granted. Nonetheless, if the Claimant had sought penalties under the correct statute, § 8-43-203 (2) (a), C.R.S., she would not be entitled to relief because she was never entitled to disability benefits, and Respondents timely filed its Notice of Contest in response to the Director's Order.

m. Under § 8-43-101, C.R.S, certain types of injuries must be specifically reported to the DOWC . § 8-43-101(2), C.R.S states:

> [I]njuries to employees that result in no more than three days' or three shifts' loss of time from work, or no permanent physical impairment, or no fatality to the employee shall be reported by the employer only to the insurer of said employer's workers' compensation insurance liability, which injuries and exposure the insurer shall report only by monthly summary form to or as otherwise requested by the division.

Indeed, an employer or carrier may pay medical benefits without admitting or contesting if three (3) days or less time off work is involved. The duty to admit or deny liability does not arise under the statute until the insurer has obtained knowledge that would reasonably lead it to believe that a claimant sustained an injury resulting in **more than three days of lost time**, if there is evidence of permanency, or in the event of a fatality. Workers Compensation Rules of Procedure (WCRP), Rule 5-2 (B), 7 CCR 1101-3; *Palmer v. Borders Group, Inc.*, W.C. Nos. 4-751-397; 4-723-172 (ICAO, Nov. 28, 2008). Additionally, disability indemnity benefits are not recoverable in all cases where an employee misses time from work. *See* § 8-42-103 (1) (a), C.R.S. That section provides, "If the period of disability does not last **longer than three days** (emphasis supplied) from the day the employee leaves work as a result of the injury, no disability indemnity shall be recoverable except the disbursement provided in articles 40 to 47 of this title for medical, surgical, nursing, and hospital services, apparatus, and supplies. . . ." § 8-42-103 (1) (a), C.R.S. As found, the Claimant missed only three days from work—not more than three days. She sought no temporary disability benefits. Additionally, the insurance carrier had no obligation to file an admission of liability or a notice of contest with the DOWC because none of the scenarios requiring an insurer to submit a filing existed. *See* § 8-43-101 (1)-(2), C.R.S; *see also* § 8-43-203 (1) (a),

C.R.S. The carrier, however, filed a timely the Notice of Contest after the Director's Order was issued. Though the Director issued an Order requiring a position statement, Claimant's injuries carried no reporting requirement. *See* § 8-43-101 (2), C.R.S. Regardless of whether the insurance carrier filed a Notice of Contest on August 19, 2014 when Claimant alleges it was due on June 29, 2014, an obligation to file earlier did not exist because the Claimant was being treated under a medical-only claim.

n. When construing the Act, an ALJ's goal is to effectuate the intent of the General Assembly, and it is the General Assembly's intent that the Act be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without resorting to litigation. § 8-40-102 (1), C.R.S.; *Dillard. v. Indus. Claim Appeals Office*, 134 P.3d 407 (Colo. 2006). The insurance carrier herein promptly and efficiently paid the Claimant's medical benefits as a result of the MVA and did so up until she was discharged at MMI by an ATP, Dr. Fall. Forcing the insurance carrier to file an admission of liability or notice of contest in a medical-only claim when disability was not at issue would be at odds with the General Assembly's intent and could tend to hinder the Claimant's receipt of medical care. Taken to its logical end, the Claimant's argument that the insurance carrier was required to file a Notice of Contest in a medical-only claim would have forced the carrier to take a position on compensability early on, which may have delayed the Claimant's treatment and forced litigation.

Burden of Proof

o. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on compensability, medical benefits and AWW. She has failed to sustain her burden on the issue of penalties against the Respondents.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's injuries, sustained in the motor vehicle accident of October 7, 2013, subject to the Division of Workers Compensation medical Fee Schedule.

B. The Claimant's average weekly wage is $703.03.

C. Any and all issues not determined herein are reserved for future decision.

DATED this 16 day of January 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

Exhibit B was rejected. Otherwise, the remainders of Exhibits A through C were admitted into evidence without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief to be filed, electronically, within 5 working days; Respondents' answer brief to be filed, electronically, within 5 working days of the opening brief; and, the Claimant's reply brief to be filed within 2 working days of the answer brief. On December 18, 2014, the Claimant filed a document labeled (Findings of Fact, Conclusions of Law and Order." On December 30, 2014, the ALJ entered a procedural order indicating that the Claimant's document would be construed as an opening brief. On December 30, 2014, the Respondents filed a document labeled "Respondents' Proposed Findings of Fact, Conclusions of Law and Order." The ALJ will construe this document as the Respondents' answer brief. No timely reply brief was filed. The ALJ is uncertain about what the parties do not understand about "briefs." In light of the fact that the ALJ has not yet decided the case, it would seem to be presumptuous to offer the ALJ proposed decisions at this juncture.

ISSUES

The issues to be determined by this decision concern whether the Claimant suffered compensable injuries on May 28, 2014, specifically, among other things, alleged mental injuries resulting from the physical injuries, or mental injuries resulting from work-related mental trauma, during the course and scope of his employment; if so, whether Claimant has established that he is entitled to reasonably necessary medical benefits, causally related to his May 28, 2014 injuries;. if so, whether selection of the authorized medical provider passed to the Claimant; and, if so, whether the Claimant is entitled to temporary disability temporary total disability (TTD) benefits from August 4, 2014 and continuing until terminated by law, in addition to TTD and temporary partial disability (TPD) benefits for the periods stipulated. The Claimant bears the burden of proof, by a preponderance of the evidence on the above stated issues.

The Respondents raised the affirmative defense that the Claimant was "responsible for his termination," effective June 6, 2014, with the Respondents asserting that the Claimant is barred from further temporary disability benefits, effective June 7, 2014. The Respondents bear the burden of proof, by preponderant evidence of this issue.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The parties stipulated, and the ALJ finds, that, if the claim is compensable, the Claimant's average weekly wage (AWW) is $443.21. The ALJ finds that this AWW results in a TTD benefit rate of $295.47 per week, or $42.21 per day.

2. The parties further stipulated, and the ALJ finds, that, if the claim is compensable and if the Claimant was not responsible for termination, the Claimant is owed TTD benefits from June 7, 2014 to June 15, 2014 and June 21 to July 20, 2014; and he is owed temporary partial disability (TPD) benefits from June 16 to June 20, 2014, and from July 21 through August 3, 2014.

3. Prior to May 28, 2014, the Claimant had no symptoms of tinnitus, headaches, dizziness, chest pains, eye pain, depression, or anxiety. He had been an employee of the Employer for approximately 10 years, performing duties of a maintenance worker. His responsibilities included mowing the lawn, weeding, trimming trees, painting, and fixing pipes, among other duties. The Employer's premises was a complex of over 600 homes, including the Claimant's home.

4. On July 29, 2014, the Respondents filed a Notice of Contest, stating that further investigation was needed for a determination of compensability and time lost.

Compensability

5. While performing his work duties on May 28, 2014, the Claimant was mowing the lawn of a park located on the Employer's property. He was using a small tractor-type riding lawn mower. The area that he was mowing had overgrown grass and weeds, which was covering a gas service pipe that protruded from the ground approximately around 4 inches but no more than 6 inches.

6. As the Claimant was mowing and attempting to turn the lawn mower, the wheels of the mower slipped due to the grass being wet and the Claimant lost control of the lawn mower. The blades of the mower, located directly underneath the mower, went over a protruding gas pipe and cut off a portion of the pipe, causing the pressurized gas to explode upward and engulfing the mower and the Claimant. The pipe was struck on the left side of the mower. The pipe was a metal pipe approximately ½ to ¾ of an inch wide. The pipe began immediately releasing natural gas.

7. The Claimant did not realize how close he was to the gas pipe because of the overgrowth that covered the gas pipe and, because there were no markers indicating the location of the pipes. The Employer had previously ordered the posts removed which had before provided notice of the placement of the gas pipes and served as protective barriers.

8. When the gas line was cut, the gas exploded with sufficient force to rock the mower. The force additionally caused the Claimant to be nearly knocked off the mower. Claimant testified the mower rocked a bit when it struck the pipe, initially stating it was the force of the gas. On cross-examination, the Claimant could not be sure whether it was the gas or the mower striking the pipe that caused the mower to rock. Either way, the Claimant remained seated in the mower. He moved the mower to the side to evaluate the damage.

9. The explosion of gas, the force and burst of noise from the gas pressure releasing as the pipe was severed created an extremely loud blast, with the gas completely enveloping the Claimant. The Claimant inhaled the gas, both through his nose and mouth.

10. The Claimant sustained several injuries. Most notably, he developed tinnitus from the damage to his auditory system as a result of being exposed to the blast of the pressurized gas.

11. Immediately after the incident, the Claimant sought a way to cover the pipe. He attempted to place a one foot square heavy brick over the pipe, further exposing himself to the gas, but the force of the escaping gas kept the brick suspended and did not permit the brick to stay on the pipe.

12. Unable to temporarily seal the pipe, the Claimant left the area and went to the maintenance shop to report the accident to Michael Slyker, his manager. Instead of demonstrating concern for the Claimant, Slyker became angry with the Claimant. In his testimony regarding this encounter, Stryker skirted the issue and made no persuasive denial of the Claimant's version of this encounter.

13. The Claimant returned to the site while Slyker went into the shop to look for fittings and tools to fix the pipe. Slyker arrived at the site, exited his truck, and could hear the noise of the escaping gas even though he came no closer to the gas line than approximately 20 to 25 feet. He looked over to where he heard the gas and observed the Claimant crouching over the ruptured gas pipe. After seeing the extent of the damage, Slyker realized that the pipe could not be repaired by them. Slyker took pictures and left, assigning the Claimant duties with the co-worker, Gregorio Garcia. The Claimant remained at the site, where he continued to be exposed to the gas.

14. According to Slyker, it may be possible to cap a broken gas pipe with tools they have in the shop. If they are unable to do so, however, the utility company must be called. When Slyker arrived at the site, he observed the Claimant near the broken pipe. According to Slyker, It was quickly apparent to him that the break would require repair by the utility company. According to Slyker, he instructed the Claimant to get away from the pipe, go on his lunch break and go work on the other side of the property, away from the leak, with Gregorio Garcia, another employee. Slyker called the office and asked that the utility company be notified. A handyman who was often working around the property, but not an employee of the Employer, ultimately plugged the pipe with a piece of wood.

15. Shortly, thereafter, a coworker arrived at the site with a piece of wood to plug the gas pipe. As the coworker hammered the wood inside the pipe, the Claimant held the wood in place, increasing his exposure to the gas.

16. There is conflicting testimony regarding what happened at the site of the leak. According to the Claimant, Slyker took a photo and left the scene right away. Claimant further stated that he held a piece wood in place while it was hammered into place. The Claimant's version of events was in conflict with the testimony of Slyker. Additionally, Gregorio Garcia testified that, while he observed that the Claimant was exposed to the gas, he did not observe him holding wood in place while the leak was plugged. The fact that Garcia did not observe the Claimant holding wood in place while the leak was plugged does not mean it did not happen. Indeed, the Claimant was there. To the extent that conflicting versions were presented regarding what happened while examining the broken pipe, the ALJ credits the testimony of the Claimant more than Slyker's and Garcia's testimony since Slyker was only there for a short while after the fact and Garcia was observing, sporadically, while the Claimant was right there.

Responsibility for Termination

17. The Claimant exhibited initial symptoms of severe nausea, vomiting, and anxiety. Despite these symptoms, he finished his working day as scheduled and subsequently returned every day for his scheduled shift until he was fired. On the day of the incident, the Claimant returned to work following the lunch break and worked the remainder of the day. He worked the rest of the week, and all of the following week, through June 6, 2014. According to Slyker, the Claimant did not report an injury during this time. Slyker stated that he did not observe any difference in the Claimant's behavior such as nervousness, shaking hands, or anything of that nature. Based on Slyker's lack of medical and psychological training, the ALJ infers and finds that Slyker's failure to observe medical or psychological symptoms bears very little weight. The Claimant may have been "smiling on the outside, and hurting on the inside."

18. On June 6, 2014, the Claimant reported to Slyker that he was experiencing symptoms from the gas explosion, including nausea, vomiting, dizziness,

and hand tremors. Slyker denies that this happened. The ALJ credits the Claimant's version in this regard and rejects Slyker's version, Slyker did not refer the Claimant to a medical provider. Consequently, the Claimant self-referred to the People's Clinic in Boulder (Clinica Family Health Services).

19. On the same date, Slyker fired the Claimant from his employment stating to the Claimant that there simply was no more work for him.

20. The Employer's stated reason for firing the Claimant was due to the damage to the Employer's property.

21. At the hearing, Slyker testified by telephone that the Claimant had numerous performance issues, concerns over safety, attention to detail, and damage to property and equipment that culminated in the decision to end the employment relationship. The culmination of Claimant's work performance resulted in the decision to terminate Claimant. The ALJ infers and finds that the Claimant's employment was terminated on June 6, 2014 because the Claimant failed to measure up because of poor performance, however, the Respondents failed to demonstrate a volitional act on the Claimant's part that would have led the Claimant to believe that he would be fired if he committed the act.

22. The Claimant stated that he reported his symptoms to Slyker on June 6, 2014, when he was informed that he was fired. Slyker testified that no symptoms or conditions were reported to him on June 6, 2014. Slyker stated that the first time he was made aware of any alleged symptoms or conditions was when he was notified of the claim by corporate headquarters near the end of July 2014. The Respondents' implied theory is that the Claimant "manufactured" a workers' compensation claim after he was fired. This theory is significantly compromised by the fact that there is medical corroboration of the facts of the Claimant's injuries and it would be a substantial threat to theorize that the Claimant had been exposed to gas fumes outside of work in light of the totality of the evidence herein. The ALJ resolves this conflict in the testimony in favor of the Claimant reporting a work-related injury on June 6, 2014, at the time that he was fired.

23. The Claimant did **not** exercise a degree of control over the circumstances leading up to his termination from employment. He was what he was –an unsatisfactory employee who did not measure up to Michael Slyker's standards

Authorization of Medical Treatment

24. Slyker did not refer the Claimant to a medical provider. Consequently, the Claimant self-referred to the People's Clinic in Boulder, Clinica Family Health Services (hereinafter "Clinica"). Clinica made generalized referrals to an opthamologist and a psychiatrist/psychologist. In response to these referrals, the Claimant saw Robert

Krone, O.D. (optometrist) and Michael Dow, Psy.D., a clinical psychologist. Both were in the chain of authorized referrals.

Medical

25. On June 9, 2014, the Claimant presented to Clinica Family Health Services (People's Clinic on Boulder) and was seen by Amy Alper, PA-C. Alper noted that since the incident, the Claimant had been constantly nauseous and could not eat. He continued to hear the gas exploding in his ears when he slept, and he had trouble sleeping due to the trauma. This had also been making him shaky. Alper noted that gas covered the Claimant, and got into his eyes. The Claimant's vision was blurry and burning. Alper assessed the Claimant as having eye pain, insomnia, and dizziness/vertigo. Alper prescribed Omeprazole and Trazodone HCL.

26. On June 9, 2014, the Claimant also saw Dr. Dow, Psy.D. He noted that Claimant had trouble sleeping, eating, nausea, and would wake up hearing hissing. Dr. Dow reported advising the Claimant about the normal effects of trauma, in the Claimant's case which were exacerbated by lack of support, and explicit additional negative consequences. Dr. Dow implied, and the ALJ finds, that the Claimant's mental problems were caused by the traumatic event of May 28, 2014 (*See* Claimant's Exhibit 4).

27. On June 25, 2014, Dr. Krone, O.D., diagnosed the Claimant with unspecified tear film insufficiency/dry eye syndrome, stating, that it "may have been caused by explosion."

28. On July 28, 2014, Amy Alper, PA-C, reported the Claimant's diagnoses as depression, anxiety, vertigo, and vision discomfort. She restricted the Claimant to sedentary duty, including lifting no more than 10 pounds, no motor vehicle operation, no driving greater than 0 minutes, no working around machinery, no ladder or stair climbing, no pole climbing, no exposure to chemicals/irritating inhalants.. Alper referred the Claimant to an ophthalmologist and a psychiatrist. She noted that the Claimant was not able to return to his regular duties without restrictions.

29. On September 11, 2014, Alper reported the Claimant's work restrictions as including no lifting over 20 pounds, no working around machinery, no pole climbing, and no exposure to chemicals/irritating inhalants. Alper continued to state that the Claimant should see an ophthalmologist, and was that he was unable to return to his regular duties without restrictions.

Claimant's Independent Medical Examination (IME) by Caroline Gellrick, M.D.

30. On October 31, 2014, Dr. Gellrick diagnosed the Claimant as: "Status post gas explosion work-related injury on the job, which occurred May 28, 2014,

loud noise exposure causing:

- Tinnitus, right greater than left ear, question decreased sensory neural hearing loss.

- Persistence of cephalalgia from concussive-type force to the chest and face, which nearly knocked him off the lawnmower.
- Chest wall discomfort, consistent with costochondritis versus anxiety.
- Anxiety with elements of PTSD.
- Conjunctivitis of the eyes persistent, with redness seen today. The patient complaining of dry eye syndrome, ophthalmology insufficient tear film active dry eye syndrome, with some nuclear sclerosis per ophthalmology.
- Occasional dizziness."

(Dr. Gellrick's Report of October 31, 2014, p. 4).

31. Dr. Gellrick recommended that the Claimant get a baseline EKG to ensure the cardiac status is normal. She stated, "I suspect the chest discomfort is due to anxiety and may be costochondritis, not a cardiac etiology." With regard to the Claimant's hearing and tinnitus, Dr. Gellrick stated that the Claimant needs a full evaluation with ENT and "they can also evaluate the dizziness with further vestibular testing." With regard to the anxiety and depression, Dr. Gellrick stated that the Claimant needs evaluation with psychology to include modalities of EMDR. Dr. Gellrick was of the opinion that the Claimant may benefit from the use of a short-acting topical steroid for the ophthalmological problem, but definitely needs repeat evaluation for irritation under workers' compensation (based on this reference, the ALJ infers and finds that Dr. Gellrick is of the opinion that all of the above medical problems are work-related). Dr. Gellrick stated that the Claimant is currently not at maximum medical improvement (MMI) for his work-related injuries, but needs further intensive evaluation with the specialists mentioned above. Dr. Gellrick stated that the Claimant should not lift over 10 pounds, should have no loud noise exposure, and should avoid mechanized equipment. Dr. Gellrick also stated that the Claimant should not drive if he is dizzy. Dr. Gellrick concluded, "It is suspected when the patient's anxiety dissipates, his cephalalgia symptoms will dissipate, but in the interim he can certainly use the preferred NSAID of Celebrex to decrease cephalalgia symptoms." (Dr. Gellrick's Report, p. 4). The ALJ infers and finds that Dr. Gellrick's opinion in this regard establishes that the cephalagia is generated by the Claimant's anxiety, a mental phenomenon.

Independent Medical Examinations of the Respondents

32. On November 12, 2014, Sharon R. Walker, M.D., performed an IME at the Respondents' request. The Claimant described the loud sound as an initial loud sound followed by hissing of leaking gas. He reported gas getting into his eyes, nose, ears and face. The Claimant was wearing safety goggles. He stated the whole incident left him shaken and scared, but he could not explain why he was scared (the ALJ takes administrative notice of, and infers and finds, that the classical definition of "anxiety" is related to fear of that which one knows not). The Claimant described nightmares of his manager knocking on the door or window and telling him to come to work, but he does not have nightmares of the actual event. The Claimant reported that most of his current symptoms began 15-20 days after the May 28, 2014, event. The Claimant also reported itchy eyes, bilateral ear pain that starts in his right ear, goes through his head, and to his other ear, followed by his whole head hurting. The Claimant reported memory loss beginning approximately 1 and ½ months after the accident. (Respondents'Exhibit. A, pp. 1-12).

33. Dr. Walker diagnosed exposure to natural gas. Natural gas was identified as a simple asphyxiant with no systemic toxicity. According to Dr. Walker, this means in a confined space natural gas displaces oxygen, but in an open air environment, there is no toxic effect. Dr. Walker is of the opinion that natural gas is not identified as irritating to the eyes or skin. Dr. Walker noted that there was no explosion meaning no noise loud enough to cause tinnitus. To the extent that the mower striking the pipe would have caused a loud noise, Dr. Walker noted that the Claimant complained of right sided tinnitus, though his left ear was closer to the sound. Further, the Claimant did not notice tinnitus until 15-20 days after the accident. Dr. Walker concluded within a reasonable degree of medical probability "based on the properties of natural gas, nature of tinnitus, lack of true explosion, delay in onset of symptoms and discrepancies in his description of the event that none of [Claimant's] complaints are the result of exposure to natural gas (Respondents' Exhibit A, pp. 10-11).

34. On November 19, 2014, Robert E. Kleinman, M.D., a psychiatrist, performed a psychiatric an IME at the Respondents' request. Dr. Kleinman noted that the Claimant reported feeling depressed and having "flashbacks." According to Dr. Kleinman, the flashbacks described, however, were not a physiologic response, but rather memories accompanied by vague feelings. The Claimant reported having recurrent dreams of his boss knocking on the window and telling him to go to work.

35. Dr. Kleinman is of the opinion that Claimant catastrophized (a verb that is apparently not used in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5,* but apparently used by Dr. Kleinman in support of his opinion that the Claimant does **not** suffer from a "work-related" psychiatric condition) the event by continuing to refer to the event as an explosion, when no explosion occurred. According to Dr. Kleinman while the Claimant exhibited signs of depression, anxiety and situational adjustment disorder, the source of this was related to the loss of the job and resulting financial hardship, not the result of exposure to natural gas. According to Dr. Kleinman, stress related to the loss of the job is indicated by the content of the Claimant's reported

dreams. For instance, the Claimant had bad dreams that his boss came to his home to make him go back to work. To the reasonably prudent lay person, this dream would seem to indicate a fear of returning to work because of the trauma to which the Claimant was exposed. For a reason not adequately explained, this dream indicates to Dr. Kleinman that the trauma is related to the Claimant's firing (dreaming about the boss forcing the Claimant back to work seems to be inconsistent with trauma caused by being fired). Dr. Kleinman noted that the Claimant's reported symptoms were inconsistent through the records and his own review, and appear to be over reported. As another example, according to Dr. Kleinman (who apparently has no expertise in Opthamology), the Claimant reported ophthalmological conditions that would be unrelated to gas exposure. Further, according to Dr. Kleinman, the Claimant's restrictions appear to be correlated to the over-reporting of symptoms and are not likely to be necessary. The ALJ infers and finds that the totality of Dr. Kleinman's opinions have a foundation in his theory that the Claimant is "catastrophizing," exaggerating and, although not explicitly stated, magnifying his symptoms. Dr. Kleinman does not go so far as to opine that the Claimant is consciously malingering. Nonetheless, Dr. Kleinman's opinions are overshadowed by his implied theory of "symptom magnification," an interesting phenomena in psychiatry if this is not a conscious process. Presumably, it may all depend on an individual and what triggers depression and anxiety in an individual with a specific make-up. Indeed, some war veterans, all exposed to the same stressors, returned with PTSD and others did not. The ALJ, however, infers and finds that Dr. Kleinman's opinions support the proposition that the Claimant's mental problems did **not** arise out of the physical injuries of May 28, 2014.

36. Dr. Kleinman did not express any opinions concerning whether the Claimant was malingering or lying. Dr. Kleinman, however, implied that the Claimant was unconsciously exaggerating, "catastrophising, thus, magnifying symptoms or the Claimant's condition was encapsulated under a dome of functional overlay. There is no indication that Dr. Kleinman's overarching foundational opinion is supported by any objective tests of scientific validity. Consequently, the ALJ has concerns about the overall credibility of Dr. Kleinman's opinions, with the exception that Dr. Kleinman's opinions do not support the proposition that the Claimant's bad dreams, anxiety and depression arose out of his physical injuries of May 28, 2014.

Claimant's Employment Subsequent to Injury

37. The Claimant found employment with J&W Five Star General Construction Company from June 16, 2014 to June 20, 2014, both dates inclusive, a total of 5 days. The Claimant was paid $460 (Claimant's Exhibit 5), or $92 per day, which yields a weekly wage of $644 for this period of time, which exceeds the AWW. He was performing work in construction, including painting but he was having problems with dizziness and lifting, so he was forced to quit this job. Consequently, the Claimant experienced no temporary wage loss during this period of time.

38. The Claimant found another job working for Colterra Restaurant from

July 21, 2014 to August 3, 2014, as a kitchen helper, but he was unable to continue to perform this job because of the heavy mats he was required to lift and he was forced to quit this job. This employer, however, advised the Claimant that when he no longer had restrictions, he could return to work. There is no persuasive evidence that the Claimant experienced a temporary wage loss during this period of time.

39. The Claimant continues to experience decreased sound tolerance, ringing and hissing in his ears, dry eyes, dizziness, chest pains, bad dreams, though not as frequent as before. He also suffers from depression and anxiety caused by the traumatic incident, caused by the explosion.

40. Based on the totality of the evidence, the ALJ infers and finds that the Claimant's depression and anxiety have been directly caused by the explosion incident, and **not** by the Claimant's physical injuries, *i.e.,* decreased sound tolerance, ringing and hissing in the ears, dry eyes, dizziness and chest pains, thus, the depression and anxiety are mental-mental phenomena.

41. The ALJ finds that the Claimant's mental injuries did **not** arise out a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. Moreover, his mental injuries arose primarily from his then occupation and place of employment, specifically, his mental reaction and trauma caused by the gas leak and explosion of May 28, 2014.

Temporary Disability

42. The Claimant was temporarily and totally disabled from June 7, 2014 to June 15, 2014 and June 21 to July 20, 2014. He was **not** temporarily and partially disability from June 16 to June 20, 2014, and from July 21 through August 3, 2014. Additionally, the Claimant has not yet been release to return to his pre-injury work without restrictions, he has not actually returned to his pre-injury work, he has not been declared to be at MMI by an authorized treating physician, and he has earned no wages, other than those earned in his brief and unsuccessful attempts at work, during which times he was temporarily and partially disabled.

Ultimate Findings

43. The Claimant presented as a credible witness insofar as his testimony contributes to the ultimate resolution of the questions involving the compensable consequences of the Claimant's injuries of May 28, 2014. As found, the ALJ has resolved the credibility conflicts in favor of the Claimant and against Michael Sylker, his supervisor. Further, the ALJ finds the opinions of the Claimant's treating providers and IME Dr. Gellrick, more persuasive and credible than the opinions of Respondents' IMEs, Dr. Walker and Dr. Kleinman, with the exception of the proposition that Dr. Kleinman's

opinions do **not** support that the Claimant's mental injuries arose out of the physical injuries of May 28, 2014.

44. Between conflicting testimony and medical opinions, the ALJ makes a rational choice to accept the Claimant's testimony and to reject Michael Slyker's testimony; and, to accept the opinions of the Claimant's treating providers and IME Dr. Gellrick, and to reject the opinions of the Respondents' IMEs, Dr. Walker and Dr. Kleinman, with the exception of the proposition that Dr. Kleinman's opinions do **not** support that the Claimant's mental injuries arose out of the physical injuries of May 28, 2014.

45. The Claimant has proven, by a preponderance of the evidence that he suffered compensable physical injuries resulting from the work-related gas line break, consisting of experience decreased sound tolerance, ringing and hissing in his ears, dry eyes, dizziness and chest pains. As a separate matter, the Claimant has proven that he sustained mental injuries consisting of bad dreams, depression and anxiety caused by the traumatic incident of May 28, 2014. The Claimant has **failed** to prove, by preponderant evidence that the mental injuries were caused by the physical injuries. Moreover, the mental injuries were caused by the mentally traumatic event.

46. The parties stipulated, and the ALJ found, if the case was determined compensable as it now is, the AWW is $443.21, which yields ATTD rate of $295.47 per week, or $42.21 per day. The AWW also is the baseline from which to measure temporary wage loss and concomitant TPD benefits, if any.

47. The parties further stipulated, and the ALJ found, if the case was compensable as it now is, the Claimant was temporarily and totally disabled from June 7, 2014 through June 15, 2013, both dates inclusive, a subtotal of 9 days; and, from June 21, 2014 through July 20, 2014, both dates inclusive, a subtotal of 30 days. The parties stipulated, and the ALJ found, that the Claimant was temporarily and partially disabled from June 16 through June 20, both dates inclusive; and, from July 21, 2014 through August 3, 2014, both dates inclusive. There was no persuasive evidence of a temporary wage loss during these periods of time. Indeed, Claimant's Exhibit 5 establishes that the Claimant's weekly wage from June 16 through June 20, 2014, exceeded the Claimant's AWW. In light of the stipulation of the parties, the issue of TPD from July 21, 2014 through August 3, 2014 remains open and upon a satisfactory showing of wages at Colterra Restaurant, if less than the AWW, the Claimant would be entitled to 2/3rds of his temporary wage loss during this period of time.

48. The Claimant has proven, by preponderant evidence that significant contributing factors to his TTD from August 4, 2014 and continuing are the physical injuries consisting of decreased sound tolerance, ringing and hissing in his ears, dry eyes, dizziness, chest pains. Indeed, Dr. Gellrick's present and prevailing restrictions are primarily tied into the physical injuries sustained on May 28, 2014.
The medical treatment provided by Clinica and its generalized referrals to Dr. Dow,

Psy.D., and Dr. Krone, O.D., were authorized and within the chain of authorized referrals. Further, the medical treatment for the Claimant's physical injuries of May 28, 2014 was and is causally related thereto and reasonably necessary to cure and relieve the effects thereof.

49. The Respondents have failed to prove, by a preponderance of the evidence that the Claimant was responsible for his termination through a volitional act, or acts, on his part that would lead a reasonable person to believe that he would be fired. Indeed, as found, the reasons for the Claimant's firing involved "poor performance," specifically, he did not measure up.

50. As found herein above, the Claimant's mental injuries did **not** arise out a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. Moreover, his mental injuries arose primarily from his then occupation and place of employment, specifically, his mental reaction and trauma caused by the gas leak and explosion of May 28, 2014. His mental injuries are separate and apart from his physical injuries and did not arise there from.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon

appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant presented as a credible witness insofar as his testimony contributed to the ultimate resolution of the questions involving the compensable consequences of his injuries of May 28, 2014. As found, the ALJ resolved the credibility conflicts in favor of the Claimant and against Michael Sylker, his supervisor. Further, the ALJ found the opinions of the Claimant's treating providers and IME Dr. Gellrick, more persuasive and credible than the opinions of the Respondents' IMEs, Dr. Walker and Dr. Kleinman, , with the exception of the proposition that Dr. Kleinman's opinions do **not** support that the Claimant's mental injuries arose out of the physical injuries of May 28, 2014.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimony and medical opinions, the ALJ made a rational choice to accept the Claimant's testimony and to reject Michael Slyker's testimony; and, to accept the opinions of the Claimant's treating providers and IME Dr. Gellrick, and to reject the opinions of the Respondents' IMEs, Dr. Walker and Dr. Kleinman, with the exception of the proposition that Dr. Kleinman's opinions do **not** support that the Claimant's mental injuries arose out of the physical injuries of May 28, 2014.

Compensability

c. In order for an injury to be compensable under the Workers'

Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant established that he sustained compensable injuries, specifically, he suffered compensable physical injuries resulting from the work-related gas line break, consisting of decreased sound tolerance, ringing and hissing in his ears, dry eyes, dizziness and chest pains. As a separate matter, the Claimant has proven that he sustained mental injuries consisting of bad dreams, depression and anxiety caused by the traumatic incident of May 28, 2014. The Claimant has **failed** to prove, by preponderant evidence that the mental injuries were caused by the physical injuries. Moreover, the mental injuries were caused by the mentally traumatic event.

Mental Injuries

d. A claim for mental injuries may be compensable under the provisions of. § 8-41-301 (2) (a), C.R.S., which states:

> "A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim shall have

arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

The ALJ concludes that the weight of the credible evidence supports the fact that the Claimant suffered a mental injury arising out of a mental trauma that occurred on May 28, 2014. As further found, the opinion of clinical psychologist, Michael Dow, Psy.D., supports the compensability of the mental-mental injury. Furthermore, the portion of Dr. Kleinman's opinion that was credited, **does not** support that the mental injuries arose out of the physical injuries of May 28, 2014. As further found, the Claimant's mental injuries did **not** arise out a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the Employer. Moreover, the Claimant's mental injuries arose primarily from his then occupation and place of employment, specifically, his mental reaction and trauma caused by the gas leak and explosion of May 28, 2014.

e. The additional compensability requirements for a mental injury [as specified in § 8-41-301 (2) (a), C.R.S.] do not apply to a mental or emotional injury which is a natural consequence of a physical injury. *See Jakco Painting Contractors v. Indus. Comm'n,* 702 P.2d 755 (Colo. App. 1985). As found, the Claimant has failed to establish that his mental injuries which arose out of his physical injuries. They were not natural consequences of his hearing hissing sounds, ringing in the ears and blurred vision. The mental injuries were a natural consequence of psychological trauma caused by the incident of May 28, 2014 itself.

f. The 12-week limitation on mental-mental disability benefits applies only to (permanent) medical impairment benefits **but not** to temporary disability benefits. *City of Thornton v. Replogle,* 888 P.2d 782 (Colo. 1995); *Rendon v. United Airlines,* 881 P.2d 482 (Colo. App. 1994). As found, only temporary disability benefits are at issue now.

Authorization of Medical Treatment

g. Because this matter is compensable, the Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of the industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). As found, this was not done. An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the right of selection passed to the Claimant and he selected Clinica, which was authorized.

h. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997 As found, the referrals to Clinical Psycholgist Dow and Optometrist Krone were within the chain of authorized referrals and the Respondents are liable for the treatment causally related to the compensable physical injuries, and the compensable mental-mental injuries.

Medical Care and Treatment

i. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to his physical injuries of May 28, 2014, and to his mental-mental injuries of May 28, 2014. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, as reflected in the evidence was and is reasonably necessary to cure and relieve the effects thereof.

Average Weekly Wage

j. As found, based on the stipulation of the parties, the Claimant's AWW is $443.21. The ALJ finds that this AWW results in a TTD benefit rate of $295.47 per week, or $42.21 per day.

Temporary Disability

k. As found, based on the stipulation of the parties, the Claimant was temporarily and totally disabled from June 7, 2014 through June 15, 2013, both dates inclusive, a subtotal of 9 days; and, from June 21, 2014 through July 20, 2014, both dates inclusive, a subtotal of 30 days. As further found, based on the stipulation of the parties, the Claimant was temporarily and partially disabled from June 16 through June 20, both dates inclusive, however, he experienced no temporary wage loss during this period and, therefore, is entitled to no TPD benefits for this period of time. The parties further stipulated that the Claimant was temporarily and partially disabled from July 21, 2014 through August 3, 2014, both dates inclusive, however, no persuasive evidence concerning a temporary wage loss, if any, was presented. In light of the stipulation, the issue of TPD for this later period should remain open.

l. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals Office (ICAO), December 18, 2000]. The Claimant's termination in this case was not his fault, under the test for "responsibility for termination." There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, a claimant's testimony alone is sufficient to establish a temporary "disability." *Id.* As found, the Claimant's temporary disability and resultant wage loss was caused by the compensable injuries of May 28, 2014.

m. Once the prerequisites for TPD and/or TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant was temporarily and totally disabled from June 7, 2014 through June 15, 2013, both dates inclusive, a subtotal of 9 days; and, from June 21, 2014 through July 20, 2014, both dates inclusive, a subtotal of 30 days. As further found, the Claimant was temporarily and partially disabled from June 16 through June 20, both dates inclusive, however, he sustained **no** temporary wage loss during this period and is, therefore **not** entitled to TPD benefits for this period of time. The parties stipulated that the Claimant was temporarily and partially disabled from July 21, 2014 through August 3, 2014, both dates inclusive, however, there was no persuasive evidence concerning his temporary wage loss during this period. Therefore, the issue of TPD for the later period should remain open.

n. As found, the Claimant has been temporarily and totally disabled since August 4, 2014 and continuing [the period from August 4, 2014, through the hearing date, December 11, 2014, both dates inclusive, equals 130 days].

Affirmative Defense of Responsibility for Termination

o. Section 8-42-105 (4), C.R.S., provides that an employee responsible for his/her own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether the claimant is responsible, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788 [Indus. Claim Appeals Office (ICAO), June 25, 2003]. The Supreme Court has determined that the "responsibility for termination" defense is not absolute and is vitiated when a worsening of condition occurs. *Anderson v. Longmont Toyota,* 102 P. 3d 323 (Colo. 2004). As found, Respondents failed to satisfy their burden of proof on the affirmative defense that Claimant was responsible for his termination through a volitional act on his part and/or that Claimant exercised ad degree of control over the circumstances leading to termination.

Burden of Proof

p. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has met his burden on all designated issues, with the exception of the mental injuries having been caused by the physical injuries of May 28, 2014, and TPD from June 16 to June

20, 2014. The Respondents have failed to meet their burden with respect to the affirmative defense of "responsibility for termination."

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims that the Claimant's mental injuries were caused by his physical injuries of may 28, 2014 are hereby denied and dismissed, however, the claim that his mental injuries were caused by the mentally traumatic exposure to the gas leak explosion of May 28, 2014, is hereby allowed.

B. The Respondents shall pay the costs of all medical and psychological care and treatment for the Claimant's injuries of May 28, 2014, subject to the Division of Workers Compensation Medical Fee Schedule.

C. As of the present time, the 12-week limitation on indemnity benefits does **not** apply because the Claimant's temporary disability as of this time is causally related to the **physical** injuries of May 28, 2014, and the limitation does not apply to temporary disability benefits.

D. The Respondents shall pay the Claimant temporary total disability benefits in the amount of $295.47 per week, or $42.21 per day disabled from June 7, 2014 to June 15, 2014, both dates inclusive, a subtotal of 9 days; and, from June 21 to July 20, 2014, both dates inclusive, a subtotal of 30 days, in the aggregate subtotal amount of $1,646.19, which is payable retroactively and forthwith. For the period from August 4, 2014 through the hearing date, December 11, 2014, both dates inclusive, a subtotal of 130 days, Respondents shall pay the Claimant the subtotal amount of $5,487.30, which is payable retroactively and forthwith. In summary, the Respondents shall pay the Claimant aggregate temporary total disability benefits through the hearing date of in the aggregate amount of $7,134.09, which is payable retroactively and forthwith.

E. Any and all claims for temporary partial disability benefits from June 16 to June 20, 2014 are hereby denied and dismissed.

F. The respondents shall pay the Claimant temporary partial disability benefits from July 21 through August 3, 2014, in an amount equal to 2/3rds of his temporary wage loss.

G. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

H.. Any and all issues, including which indemnity benefits will be attributable to the Claimant's mental-mental injuries, are reserved for future decision.

DATED this 5 day of January 2015.

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

The issues presented for determination are whether the claim should be reopened and Respondents permitted to withdraw their general admission of liability based on allegations of fraud. Alternatively, Respondents seek to reopen Claimant's permanent total disability award based on an allegation that Claimant has the ability to return to employment. Respondents also seek applicable offsets and claim an overpayment.

Claimant filed a response to application for hearing alleging penalties pursuant to § 8-43-304, C.R.S., for Respondents' alleged failure to pay permanent total disability benefits as ordered by ALJ Cannici on February 1, 2010. Claimant also alleges penalties pursuant to § 8-43-304, C.R.S., for Respondents' alleged failure to comply with Rule 5-8 regarding permanent total disability benefits alleging Respondents terminated permanent total disability benefits without a hearing. Claimant also alleges penalties pursuant to § 8-43-304, C.R.S. for Respondents alleged failure to pay medical benefits consistent with the fee schedule in WCRP Rule 18.

The response to application for hearing alleges the defenses of WCRP Rule 7-3 (A) alleging Respondents failed to meet reopening requirements, waiver, estoppel, issue preclusion, claim preclusion, res judicata, doctrine of laches, statute of limitations, § 8-43-303, C.R.S. (2005), costs pursuant to § 8-42-101 (5), C.R.S., and attorney's fees pursuant to § 8-43-211 (2)(d),C.R.S. for endorsing issues not ripe for adjudication, C.R.S. § 8-43-203 (2), *Lewis v. Scientific Supply*, 897 P.2d 905 (Colo. App. 1995) and appeal of prehearing orders.

In response to the penalty allegations, Respondents moved to endorse the issue of 'cure' pursuant to C.R.S. § 8-43-304 (4), which was granted on February 25, 2013.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. The Claimant worked for the Employer as a hairstylist and manager.

2. On August 28, 2005, the Claimant completed an Employer's First Report of Injury and reported that on August 28, 2005, she injured her left arm. She reported that she was changing loads of towels, spilled water on the floor, fell and hurt her left lower arm. She indicated she had a strain and limited mobility. No one witnessed the accident.

3. The Claimant went to the Boulder Medical Center on August 28, 2005 and reported that she slipped in water and put arm out to break her fall. According to the treatment note, the Claimant had a contusion and possible fracture. She was released to return to work with restrictions.

4. The Respondents admitted liability on October 17, 2005, and the Claimant underwent medical treatment and continued to work for the Employer in a modified duty capacity until May 5, 2007, when the Claimant began experiencing pain in her thoracic spine. A separate workers' compensation claim was initiated.

5. The Claimant underwent treatment for her thoracic spine symptoms until she was placed at maximum medical improvement (MMI) on August 9, 2007.

6. By stipulation of the parties which was approved by the Judge on January 3, 2008, the 2005 claim was re-opened and the 2007 thoracic spine claim was incorporated into the 2005 left arm claim.

7. The Claimant has received a significant amount of medical treatment for her injuries, including a spinal cord stimulator.

8. On February 10, 2010, after a contested hearing, ALJ Peter J. Cannici found that Claimant was permanently and totally disabled. The Respondents did not appeal ALJ Cannici's decision.

9. Claimant has continued to receive maintenance care from her authorized treating physicians.

Findings related to fraud allegation

10. Kimberly Workman, the adjuster on this claim, testified that prior to July 26, 2010, Respondents had not received any information that would suggest Claimant had not suffered an injury at work on August 28, 2005, but rather suffered her injury the day before at Water World. Workman testified that, if at the time of the filing of the original General Admission of Liability, Respondents had information that Claimant had actually suffered an injury to the same body part the day before at Water World, Respondents would have never admitted liability in this claim. Rather, Respondents would have filed a Notice of Contest.

11. On July 26, 2010, Workman received a phone call from the fraud unit with the DOWC notifying Respondents that a tipster had called stating that Claimant did not have an injury at work, but rather injured herself the day before at Water World. Workman testified that she relayed this information to the adjuster who then notified defense counsel. Specifically, the e-mail that Workman sent to the adjuster is dated July 26, 2010. The e-mail stated the following:

Hi Cathy,

> I just got a call from the fraud department at the DOWC. They received a tip (we think it is from the ex-husband) stating that EE never got hurt at work. She was hurt at Water World. In attendance were her ex-husband, ex-mother-in-law, and brother. Apparently, EE is driving to California right now to take the kids to Disney Land. "Herman" (our tipster) can be reached at 303-591-5456.
>
> You may want to pass this along to defense counsel. Thanks.

12. H. Armenta was Claimant's husband from April 2001 through May 2009.

13. H. Armenta provided a statement to a private investigator on October 5, 2010. During that recorded statement, H. Armenta stated that the day before Claimant filed a Workers' Compensation claim, Claimant, Claimant's daughter, Claimant's brother, James, and H. Armenta went to Water World. Water World is a water park in the Denver metro area.

14. H. Armenta stated that at Water World, the Claimant, H. Armenta, and Claimant's brother, were in inner tubes floating in the wave pool. When the waves started to come, Claimant reached out to get hold of her brother's tube and when the wave hit, it separated her away from her brother's tube. In that process, she hurt her left arm because she was holding on to H. Armenta's tube and her brother's tube at the same time, and H. Armenta and her brother went separate ways. In this recorded statement, H. Armenta also stated that on August 28, 2005, he received a phone call from Claimant stating that Claimant was in the hospital because she had just fallen at work. When H. Armenta asked her what happened, Claimant stated that it was just from yesterday, that she was hurt at Water World and that she had just filed it as a Workers' Compensation claim. In the recorded statement, H. Armenta also stated that Claimant had decided the night of August 27, 2005 that she would report this injury to her left arm as a work-related injury the next day because it was best for the family.

15. At hearing, H. Armenta testified that on August 27, 2005, he was at Water World with Claimant, Claimant's brother, James, and her mother as well as their daughter, Alexa. H. Armenta testified that Claimant, Claimant's brother, James, and he were in the large wave pool. H. Armenta testified that when the wave hit their tubes, Claimant was pulled in both directions. As a result, Claimant began complaining of pain in her left arm, neck, and back. H. Armenta testified that immediately following this incident, they left Water World because Claimant was in too much pain to stay there. Claimant was experiencing pain in these areas on the night of August 27, 2005, as well as the morning of August 28, 2005.

16. H. Armenta has denied that he has ever contacted the fraud unit at the Division of Workers' Compensation despite the many references to the contrary. In three separate documents, Respondent's counsel referred to H. Armenta as the reporting party. Further, the comments made by Workman to the former claims adjuster are telling. Armenta's first name was specifically mentioned. It is apparent, despite his vehement denials, that Armenta called the DOWC fraud line.

17. The allegation regarding Water World surfaced on July 26, 2010. By then, H. Armenta and Claimant had been divorced for over a year. Armenta reported to the fraud tip line that Claimant was on her way to Disneyworld with her two children. H. Armenta is their father.

18. The evidence presented suggested that the Claimant's divorce from H. Armenta was contentious. The two argued about custody of their two children, child support, and visitation schedules.

19. Martha Armenta is H. Armenta's mother. M. Armenta gave a statement to an investigator on October 5, 2010. She stated that Claimant told her that after Claimant had been drinking margaritas at a Broncos party, that Claimant actually injured herself at Water World. M. Armenta also stated that H. Armenta had told her at one time that Claimant injured herself at work.

20. M. Armenta also made inconsistent statements concerning when she learned Claimant was allegedly injured at Water World rather than at work. She also testified at hearing that Claimant told her at the Broncos party that Claimant injured herself at work then changed it and said she meant to say Water World.

21. M. Armenta's testimony is equivocal and unpersuasive.

22. H. Armenta's testimony and reports of fraud lack credibility. H. Armenta had motivation to fabricate the reports made to the DOWC. Further, his repeated denial that he contacted the DOWC fraud tip line renders his testimony wholly incredible.

23. The testimony of Claimant's family members concerning how Claimant injured herself is of little consequence and will not be recited in this order. The evidence presented by Respondents to support the fraud claim is not persuasive and lacks credibility.

Reopening – No longer PTD

24. In rendering his decision concerning PTD, ALJ Cannici relied on work restrictions issued by Dr. Justin Green on June 9, 2009. Dr. Green opined that Claimant should not engage in repetitive lifting with her left upper extremity; no lifting greater than five pounds on an intermittent basis with the left upper extremity; no prolonged standing greater than 30 minutes; no working greater than 90 minutes continuous sitting without a 15-minute rest break. Dr. Green recommended no greater than 1-2 hours of work per day. Dr. Green based his restrictions on a June 2009 Functional Capacity Evaluation (FCE) and on his clinical judgment.

25. Since Claimant was determined permanently and totally disabled, the Respondents have conducted video surveillance of the Claimant. The ALJ reviewed all of the video surveillance admitted into evidence.

26. In the September 6, 2010 video, the ALJ observed the following: The Claimant was shopping at Wal-Mart. She picked up an item with her left hand. She

held a greeting card in her right hand. Neither item appeared to be particularly heavy. The Claimant was in the store for approximately 45 minutes. As she was leaving, she was leaning on the grocery cart and pushing it slowly.

27. In the video taken on January 26, 2011, in the span of eight minutes, the Claimant left her house, placed her purse down in the front of a minivan, and lifted a child into the back of a minivan.

28. Five months later on May 30, 2011, the Judge observed the Claimant smoking cigarettes using her left hand. She picked up a young child who she primarily held with her right hand (and not her left arm contrary to Dr. Olsen's noted observations). The Claimant walked out of the camera view with the child and reappears within seconds. The Claimant was next observed holding a spray bottle for week killer (which appeared to be a one-gallon size) in her right hand which was attached to a hose and sprayer which the Claimant held with her left hand. She sprayed some weeds while bent at the waist. At one point she pumped the spray bottle with her left hand and then held the bottle with her left while holding the sprayer with her right arm. After spraying weeds for approximately ten minutes, the Claimant began using garden loppers to cut weeds or plants. She bent over at the waist to make the cuts and used her right hand to pick up the debris. The Claimant performed this activity for approximately six minutes before taking a break. While taking a cigarette break, the Claimant helped lower her older child out of a tree. The Claimant raised her arms over her head for a few seconds to help the child. The Claimant does not return to gardening activities in this video.

29. Later on May 30, 2011, the Claimant went for a walk with three children, two of whom she pulled in a wagon. The walk lasted approximately 24 minutes. The Claimant pulled the wagon with her right arm for the first eight minutes, she switched to her left arm for approximately ten seconds then switched right back to pulling with her right arm. The Claimant primarily pulled the wagon with her right arm and used her left arm for seconds at a time on two occasions. The Claimant occasionally raised her left hand and arm to her head to keep her hat from blowing away due to the obvious wind.

30. In the video taken on June 11, 2011, the Claimant walked a short distance with some papers in her left hand. On June 14, 2011, the Claimant walked a short distance with some papers in her left hand. She appeared to walk with a slight limp. The Claimant is next observed walking out Target carrying a bag of items with her left arm and hand.

31. On June 23, 2011, video surveillance shows the Claimant walking to a store with a wallet under her left arm. She purchased cigarettes then walked home carrying the cigarettes in her left hand. The total time of this video is seven minutes.

32. On June 24, 2011, video surveillance shows the Claimant walking to the store with two young girls (presumably her daughters). At one point, she bent down to put a cigarette out using her left arm. She bent at the waist as well as bending her legs. They enter the store and Claimant returns with a plastic bag which she initially carried

on her right arm. She switched the bag to her left arm at point and also held her daughter's hand with her left hand. She walked while carrying the bag in her left hand for about five minutes before bending down again to put a cigarette out on the curb. The Claimant switched bag back to her right hand for the next five to six minutes. She carried the bag in her left hand again very briefly before entering her house.

33. On August 29, 2011, video surveillance shows the Claimant lifting her younger child into a minivan. The Claimant bends slightly at the waist into the van. Later on August 29, 2011, the Claimant crouches down for approximately two to three minutes to put new tags on a truck. She also bent down on the waist to complete the task. The Claimant also bent at the waist to pull some weeds for approximately two minutes.

34. On August 30, 2011, very little footage was obtained. The Claimant stood for a few minutes reading some papers she held with her left hand while she smoked a cigarette with her right hand.

35. On March 21, 2013, Dr. Green issued a report wherein he noted that he had reviewed surveillance video taken of the Claimant, a report from Dr. Nicholas Olsen, and a repot from Starting Point dated February 11, 12, and 13, 2013. Dr. Green also examined the Claimant on that day. Based on the information before him at that time, Dr. Green opined that Claimant's had improved. He recommended work restrictions of maximum lifting 20 pounds floor to knuckle; no greater than 10 to 15 pounds of repetitive lifting; no prolonged standing greater than 30 minutes without a 10 minute posture break; and no greater than 90 minutes of continuous sitting without a 15 minute rest break. Dr. Green recommended that Claimant work for no greater than 3 to 4 hours per day.

36. Counsel for Claimant sent a copy of the Starting Point evaluation to Dr. Phil Cambe in a letter dated February 20, 2013. In a report dated February 27, 2013, Dr. Cambe put a check by the following statement purportedly prepared by counsel for Claimant:

> I have been treating [Claimant] for her work injury for many years. I agree with the findings in the Starting Point evaluation dated February 16, 2013 and signed by Pat McKenna. [Claimant's] condition has not substantially changed. The work restrictions provided by Dr. Green on June 9, 2009 are still appropriate.

37. The Claimant underwent a Work Performance and Occupational Feasibility Evaluation at Starting Point with Pat McKenna on February 11, 12, and 13, 2013. Ms. McKenna concluded that Claimant could lift 10 pounds from floor to chin level on a very rare basis; 5 pounds from floor to overhead on an infrequent basis with her right arm; and four pounds from floor to overhead on a rare basis with her left arm.

38. Ms. McKenna also made the following observations based on the Work Performance and Occupational Feasibility Evaluation:

> Claimant could not complete one minute of the assembly test which is bilateral, lifting pegs, not dissimilar to those on a cribbage board and placing them in holes in the board in front of her.
>
> If Claimant's left hand had to be engaged at all in a task, her pain became so severe that it would have made it impossible for her to concentrate well.
>
> Claimant was only able to flex her right shoulder 66 degrees and abduct her right shoulder 106 degrees.
>
> Claimant was only able to sit for 20 minutes at a time and two hours in a eight hour day.
>
> Claimant was only able to stand one to ten minutes at a time and 30 minutes an entire day.
>
> Claimant was only able to walk for 20 minutes at a time and two hours in an eight hour day.
>
> Claimant, with her left arm, was unable to tolerate even light lifting on a repetitive basis (such activity would cause a significant increase in her pain)
>
> Claimant was very limited in reaching above her shoulder level, reaching from waist to chest level, and reaching below waist level.
>
> Claimant, with grasping activities, was limited to extremely limited.

39. Ms. McKenna stated that, based on Claimant's evaluation, Claimant would be so limited in her ability to use her left hand and arm that it would be very difficult for her to even get ready for work.

40. Ms. McKenna ultimately concluded that she agreed with Dr. Green's restrictions in his March 21, 2013 report, and opined that Claimant would not be able to sustain any job in a manner that an employer would be able or willing to tolerate.

41. Doris Shriver evaluated the Claimant on October 1, 2009. Based on the restrictions Dr. Green had imposed on June 9, 2009, and on other factors, Ms. Shriver opined that Claimant was unable to work in any capacity.

42. Ms. Shriver evaluated the Claimant again on April 29, 2013. During the hearing, Ms. Shriver testified that she had reviewed the medical records from Dr. Green,

Dr. Cambe, Dr. Olsen, as well as the Starting Point evaluation dated February 16, 2013. Based on the review of these medical records, it was Ms. Shriver's opinion that she believed Claimant was doing slightly worse than how Claimant presented during the October 2009 evaluation. Ms. Shriver disagreed with Dr. Green's restrictions in his March 21, 2013 report.

43. The video surveillance taken of the Claimant did not impact Ms. Shriver's opinions. Ms. Shriver pointed out that the video surveillance merely represents a "snapshot" of Claimant's life on a particular day and should not be used as a measure of potential work performance.

44. Dr. Nicholas Olsen issued a report dated September 20, 2012, and another report dated December 11, 2012. In the September 20, 2012 report, Dr. Olsen documents reviewing video surveillance as part of his overall evaluation of Claimant. Dr. Olsen documented his observations in his report dated December 11, 2012. Dr. Olsen opined that Claimant's current permanent restrictions should be: 40 pound maximum lifting limit and a 25 pound repetitive lifting limit. No limits on her ability to work overhead. No limits in sitting, standing, or walking. Dr. Olsen also indicated that these would represent Claimant's minimal capability.

45. At hearing, Claimant testified as to her ongoing restrictions that she believes are attributable to this injury. Claimant testified that she does not have any "good" days, only "bad" days or "average" days. In the course of a week, she believes she has 2-3 average days a week, the rest being "bad." When she is having a "bad" day, she can barely stand or walk at all. Claimant does not believe she can do any lifting when she is having a "bad" day. Claimant does not believe that she can do any pushing and pulling with her left arm when she is having a "bad" day. Claimant does not believe that she can do any lifting when she is having a "bad" day. Claimant does not believe that she can do any pushing and pulling with her left arm when she is having a "bad" day. Claimant does not believe that she can do any fine manipulation with her left upper extremity on a "bad" day. Claimant does not believe that she can reach above her shoulder when she is having a "bad" day.

46. On an "average" day, Claimant does not believe that she can stand more than 15 minutes before she begins to experience pain. Claimant does not believe she can walk for more than 45 minutes before she needs to discontinue that activity. Claimant does not think that she can lift more than 10 pounds on an "average" day. On an "average" day, Claimant still does not believe that she can lift overhead with her left arm. Claimant does not believe that she can push or pull at all with her left arm on an "average" day.

47. As part of her evaluations with Dr. Cambe, Claimant has completed Brief Pain Inventories over the period of time from August 9, 2010 through February 26, 2013. In the Brief Pain Inventory forms, Claimant was asked to rate how her pain interferes with the following activities: general activities, walking ability, normal work (includes both work outside the home and house work), and sleep. Claimant was asked to rate on a scale of 0 to 10 with 0 being no interference in that activity and 10 being

complete interference in that activity. As these inventory forms reflect, Claimant has consistently indicated to Dr. Cambe that her pain has resulted in complete interference of general activities, walking abilities, normal work activities, and sleep.

48. During Claimant's evaluation with Dr. Olsen on September 20, 2012, Claimant also provided a description of her perceived limitations. Specifically, Ms. Deane stated the following to Dr. Olsen: She is unable to carry anything using both hands and unable to use her left hand. With regards to yard work, Claimant attempted to plant flowers on Mother's Day, but her mother had to finish the task. At a store, Claimant pushes the cart with her right arm and waist while she rests her left arm on the cart. Claimant rarely grips with her left arm. Claimant is not able to use the left hand to turn a grocery cart.

49. In addition, during Dr. Olsen's physical examination of Claimant, Claimant was only able to demonstrate forward flexion in her left shoulder of 90 degrees and 120 degrees in her right shoulder. Claimant was unable to lift her right arm above head height and left arm above shoulder height. In her upper extremities, Claimant was only able to demonstrate 1/5 strength at wrist grip, and 2/5 at wrist flexion and extension. Dr. Olsen indicated this was for both of her upper extremities.

50. Dr. Olsen explained that on a scale of 0 to 5 with grip strength, 0 is no strength whatsoever and 5 is full strength with maximum resistance. With 1/5 grip strength, a physician can see contractibility, but there would be no range of motion initiated by the patient. With 2/5 grip strength, a patient would require some assistance to complete full range of motion. Dr. Olsen testified that he asked Claimant to squeeze his index finger with each of her hands. He could see that Claimant was trying to contract her hands but there was really no significant force.

51. Margot Burns was retained by Respondents as their vocational expert. Ms. Burns issued a report dated March 20, 2013. Based on the restrictions that Dr. Olsen had placed on Claimant in his September 20, 2012 report, Ms. Burns opined that based on these updated restrictions, Claimant would be able to return to work as a hair stylist. Additional occupational choices that Claimant would be able to perform given Dr. Olsen's restrictions included receptionist, customer service representative, security guard, host/greeter, and movie theatre employee. As part of Ms. Burns' evaluation, labor market research was done to determine whether these positions were readily available in the Denver labor market. Based on this labor market research performed specifically for this claim, as well as labor market research that Ms. Burns continuously performs as a vocational expert, it was her opinion that positions within these occupations were readily available in the Denver labor market.

52. Ms. Burns also provided her vocational opinions based on Dr. Green's permanent restrictions identified in Dr. Green's March 21, 2013 report. Ms. Burns rendered the opinion that Claimant could perform the occupations of receptionist, greeter, or a customer service person. In some of these positions, Ms. Burns indicated that an employer may need to provide an accommodation in order to comply with Dr. Green's restrictions. However, Ms. Burns stated that it has been her experience that

nearly every employer will accommodate a person if that person is still able to perform the essential functions of the job. For instance, if a person is taking tickets, that person could perform the job sitting on a stool, or standing. Consequently, as long as the restrictions do not change the scope of the job or the essential functions of the job, employers are consistently willing to accommodate those restrictions.

53. Doris Shriver also performed an evaluation of Claimant and issued an updated report dated April 29, 2013. Ms. Shriver did not meet with Claimant for this updated evaluation, but she did review the Starting Point evaluation, and had a conversation with the Claimant about the surveillance videos. Ms. Shriver testified that the Starting Point evaluation was consistent with the initial evaluation she conducted in 2009.

54. Ms. Shriver opined that Claimant is unable to work for a full eight-hour work day. She also testified that Claimant is unable to work three to four hours per day consistently. Ms. Shriver also testified that some employers may allow flex time, but no employer will consistently allow an employee to arrive late, choose a schedule, lie down or leave if the employee is unable to continue working. Ms. Shriver ultimately opined that Claimant continues to remain unemployable.

55. As noted above, Ms. Shriver disagreed with the restrictions that Dr. Green provided for Claimant in his March 21, 2013 report. However, Ms. Shriver agreed that Claimant would be employable if Dr. Olsen's restrictions in his September 20, 2012 medical report were accurate.

56. The ALJ finds that Claimant is likely present herself to treatment providers and evaluators as more disabled than she actually is; however, the video surveillance does not demonstrate that Dr. Olsen's restrictions are appropriate. The video surveillance shows short snapshots of Claimant's life, and nothing in the videos demonstrates that Claimant should have no limits on her ability to work overhead or no limits in sitting, standing, or walking. The restrictions imposed by Dr. Green on March 21, 2013 are the most appropriate. He reviewed the video surveillance as well as additional medical reports when he provided the updated work restrictions making his opinion well-informed.

57. Based on the restrictions issued by Dr. Green on March 21, 2013, both Ms. McKenna and Ms. Shriver have opined, and the ALJ agrees, that Claimant cannot sustain employment. Ms. Burns' opinion to the contrary is not persuasive. In addition, Dr. Cambe consistently evaluates the Claimant and he has opined that Dr. Green's initial restrictions from 2009 are most appropriate. Under either set of restrictions, the ALJ finds that Respondents have failed to prove that Claimant has engaged in activities that would indicate she can return to employment.

Penalty Claims

58. Following ALJ Cannici's February 10, 2010 Order, Respondents filed a Final Admission of Liability on May 5, 2010.

59. In a Notice of Award dated October 1, 2011, the Social Security Administration notified Claimant that she had received an award of Social Security disability benefits. Specifically, Claimant was determined to be entitled to permanent total disability benefits beginning July 2009 and ongoing. Claimant's monthly benefit amount equaled $1,314.00. Because of the retroactive award of Social Security disability benefits, Claimant had been overpaid permanent total disability benefits in the amount of $21,789.96.

60. Respondents filed a Final Admission of Liability on April 17, 2012. In that Final Admission of Liability, Respondents stated the following:

> Per the attached Social Security disability award dated October 1, 2011, Claimant began receiving Social Security disability benefits in the amount of $1,314 per week effective July 1, 2009. Respondents shall, prospectively, take the statutorily allowed Social Security disability offset of $151.62 per week. In addition, because of Claimant's award of Social Security disability benefits is retroactive to July 1, 2009, Claimant has been overpaid $21,789.96. By agreement of Claimant through counsel, in counsel for Claimant's letter dated January 23, 2012, Claimant is agreeable to allowing Respondents to taking an additional $75.81 per week to recoup the overpayment. Consequently, the total offset that Respondents will take against Claimant's permanent total disability award is $227.43.

As a result, beginning February 6, 2012, Claimant was receiving a weekly PTD rate of $15.87. The Claimant did not object to this Final Admission of Liability.

61. At hearing, John Messner, the adjuster that filed the April 17, 2012 Final Admission of Liability, stated that he had a copy of the January 23, 2012 letter from counsel for Claimant that was referenced in the Final Admission of Liability. At hearing, Claimant testified that she authorized the offer allowing Respondents to take the offset of $151.62 per week and the additional amount of $75.81 per week consistent with the January 23, 2012 letter from her counsel.

62. Claimant, in her Response to Application for Hearing dated May 16, 2013, identified the following as the penalty claim that she was alleging against Respondents concerning adjustment of payment of her permanent total disability. Penalties pursuant to C.R.S. Section 8-43-304 for failing to pay PTD benefits as ordered by ALJ Cannici in an Order dated February 1, 2010 (penalty dates from February 5, 2012 ongoing or August 15, 2012 ongoing) (the amount of PTD benefits were reduced in February 2012 and were stopped in August 2012 in violation of the ALJ's Order dated February 1, 2010). Penalties pursuant to C.R.S. Section 8-43-304 for failing to comply with Rule 5-8 regarding permanent total disability benefits (penalties date from August 15, 2012 ongoing – Respondents terminated PTD benefits without a hearing in August 2012 in violation of Rule 5-8).

63. The Claimant failed to prove that the reduction in PTD in February 2012 was inappropriate under the circumstances. This is especially true given that Claimant failed to notify the Insurer about the reduction until she filed a response to an application for hearing alleging penalties in February 2013. It is apparent that the Claimant expected the reduced amount and only complained about it once the Respondents alleged that she committed fraud by filing this workers' compensation claim. She also never objected to the April 17, 2012 Final Admission of Liability.

64. The Claimant testified that the Respondents ceased all PTD payments in August 2012. The payment log reflects a gap in PTD payments from August 20, 2012 through February 7, 2013. If payments are made every two weeks, payment would have been due on September 3, 2012, subjecting the Respondents to penalties for 157 days.

65. The Claimant admitted that she has been receiving PTD checks subsequent to February 2013 in the amount of $31.74 every two weeks.

66. The Respondents offered no explanation for the failure to timely issue PTD payments to the Claimant for approximately six months. In a claim file note dated February 5, 2013, a notation was made that PTD had not been paid since August and that 20 weeks was owed to the Claimant. The adjuster made an additional note about claim reserves, but did not state that the failure to confirm reserves was the reason for the failure to pay the PTD. In any event, the Respondents admitted, through that claims file notation, that they did not pay PTD for 20 weeks.

67. Claimant failed to notify the Respondents that she had not received PTD checks until she filed a response to an application for hearing on February 4, 2013. Claimant offered no explanation for the delay.

68. In a Prehearing Conference Order from PALJ McBride dated June 20, 2013, Claimant was allowed to add the issue of penalties for hearing pursuant to C.R.S. Section 8-43-304 for failure to pay medical benefits consistent with the fee schedule in W.C.R.P. Rule 18. At the commencement of the hearing, Respondents confirmed that the penalty that Claimant was requesting was for improper fee scheduling of certain bills as opposed to non-payment of certain bills from Dr. Bennett.

69. Jody Wasserman is the billing and collection manager for Dr. Bennett. In a letter dated June 11, 2013 from Ms. Wasserman to counsel for Claimant, Ms. Wasserman attached a spreadsheet reflecting how certain bills for certain dates of service were either not paid or, in her opinion, were not paid pursuant to the fee schedule.

70. On May 3, 2010, Dr. Bennett's office billed the Insurer for a date of service of April 28, 2010. The Insurer paid only $429.29 on June 1, 2010. Ms. Wasserman initially testified that Dr. Bennett's office did not receive the rest of the payment until August 3, 2013. She later testified that the Insurer or third party administrator paid all outstanding bills by July 1, 2013.

71. It is not abundantly clear from the record that the basis for the underpayment was due improper fee scheduling. The April 28, 2010 date of service involved a right sided radiofrequency procedure, but Claimant offered no explanation concerning how that procedure should have been fee scheduled other than Ms. Wasserman's testimony that Respondents owed more than $429.29 for performing the procedure.

72. In Ms. Wasserman's letter to counsel for Claimant dated June 11, 2013, Ms. Wasserman stated that she had recently completed an audit of Claimant's claims. Ms. Wasserman testified that she did not complete the audit for determining whether the remaining bills were properly fee scheduled until sometime in June 2013. Ms. Wasserman testified that prior to performing this audit, she was unaware that Dr. Bennett's medical bills for dates of service referenced in her spreadsheet were improperly fee scheduled. Ms. Wasserman confirmed that as of July 1, 2013, Dr. Bennett's bills had been paid in full. Ms. Wasserman also confirmed that once the third party administrator was notified of the billing problems, she received 16 checks within a reasonable period of time which cleared up the outstanding accounts.

CONCLUSIONS OF LAW

Based on the findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo.App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Waiver

4. The Claimant asserts that Respondents waived their right to seek reopening of this claim because Respondents filed two final admissions of liability admitting for permanent total disability benefits in 2012, which was after the alleged fraud first surfaced and after the Respondents had taken surveillance video of the Claimant. The ALJ disagrees that the doctrine of waiver applies under these circumstances. Under § 8-43-303(1), C.R.S., a party may file a petition to reopen on the ground of fraud at anytime within six years after the date of injury. In addition, when a claimant has been determined to permanently and totally disabled, the award may be reopened at any time to determine if the claimant has returned to employment or has participated in activities which show that the claimant has the ability to return to employment. Section 8-43-303(3), C.R.S. The ALJ concludes that filing admissions of liability concerning The filing of a final admission of liability merely for the purpose of claiming an offset does not constitute waiver.

Reopening - Fraud

5. Section 8-43-303(1), C.R.S., provides:

> At any time within six years after the date of injury, the director or an administrative law judge may … review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

6. In this case, the Respondent bears the burden of Claimant shoulders the burden of proving by a preponderance of the evidence the Claimant fraudulently induced the filing of an admission of liability for an injury the Respondents allege occurred outside the course and scope of Claimant's employment with the Employer. Section 8-43-201, C.R.S. The Respondents have failed to prove that Claimant fraudulently induced the filing of a general admission of liability when she initially filed this claim in August 2005. The evidence Respondents rely upon lacks credibility and is not persuasive. The motivation of Claimant's former husband, Herman Armenta, is highly questionable. Mr. Armenta's testimony that he was not in fact the person who notified the Division of Workers' Compensation lacks credibility in light of the other evidence to the contrary. The ALJ also does not believe the testimony of Martha Armenta. She appeared confused.

Reopening - Ability to Work

7. Cases in which a claimant is determined to be permanently and totally disabled may be reopened to determine if a claimant has returned to employment or if the claimant has participated in activities which indicate the claimant has the ability to return to employment. If either circumstance is proven, claimant's permanent total disability award shall cease. Section 8-43-303(3), C.R.S. Respondent bears the

burden of proof to establish that Claimant has engaged in activities which would indicate that she has the ability to return to employment.

8. Respondents failed to meet their burden of proof. The Starting Point evaluation, the OT Resources evaluation from 2009, Dr. Green's restrictions from 2009, and the functional capacity evaluation done by Shari Barta in 2009 are all relatively consistent with regards to Claimant's functional ability. Dr. Cambe still believes the 2009 restrictions by Dr. Green are appropriate. In March 2013, Dr. Green altered the weight restriction and the amount of time Claimant can work, but this alteration was still highly inconsistent with the work restrictions proposed by Dr. Olsen. Respondents' own vocational expert, Margot Burns, testified that an employer would have to modify a job position to fit within Dr. Green's 2013 restrictions. As found, such modification means that jobs are not available on the open labor market. Doris Shriver persuasively testified that employers would not modify a position to fit Claimant's restrictions. Dr. Olsen opined that Claimant can engage in activities that would enable Claimant to work; however, no persuasive evidence supported Dr. Olsen's opinions regarding appropriate restrictions or that Claimant can engage in such activities on a consistent basis in work environment.

9. The three-day evaluation done at Starting Point is persuasive as is the report of treating physician Dr. Cambe who adopted this report. Dr. Cambe is the only physician who is seeing Claimant on a regular basis at this point. Given that fact, his opinion that Claimant's condition has not substantially changed is highly persuasive.

Penalties

10. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides in relevant part, that any employer or insurer:

> who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey and lawful order…, shall be subject to … a fine of not more than five hundred dollars per day for each such offense.

First, it must be determined whether a party has violated any provision of the Workers' Compensation Act or an Order. If a violation is found, it must then be determined whether the violator acted reasonably. §8-43-304, C.R.S.; *see also Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). In this case, the Claimant seeks penalties for three reasons: Respondents' failure to pay PTD to the Claimant when owed; unilateral reduction of PTD payments; and failure to properly pay Dr. Bennett's bills consistent with the DOWC fee schedule.

11. As found above, the ALJ declines to impose penalties for the reduction in the PTD amount which occurred in January 2012. It is apparent the Claimant anticipated

the reduction based on her agreement to have her payments reduced to repay an overpayment. She made no complaints about the reduction until well after it had begun. As such, the Claimant has not proven that penalties should be imposed against the Respondents for issuing a reduced PTD check starting in January 2012.

12. The Respondents admittedly failed to pay PTD to Claimant when owed over a period of 20 weeks which totaled $317.40. As such, penalties are appropriate. After considering the factors set forth in *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005), the ALJ imposes a penalty of $50.00 per day for a period of 157 days (September 3, 2012 through February 7, 2013) for a total penalty of $7,850.00. The Claimant offered no testimony that the failure to receive the PTD payments presented a hardship for her, and she failed to even notify the Respondents that she was not receiving the payments until her attorney filed a response to an application for hearing in February 2013. Respondents offered no credible explanation about why the payments were not made. Yet, they cured as soon as they were notified. As such, a minimal penalty is warranted.

13. Regarding Claimant's claim of penalties for Respondents' failure to pay Dr. Bennett's bill consistent with the fee schedule, the ALJ declines to impose penalties. Ms. Wasserman believed the underpayment was due to inappropriate fee scheduling, but no persuasive evidence was offered to show how the procedure should have been billed. The Claimant made no specific reference to WCRP Rule 18 and which procedure applies to this penalty claim. Although the ALJ has no reason to doubt the veracity of Ms. Wasserman's testimony, she simply did not make it clear as to why she felt that the Respondents improperly fee scheduled the April 28, 2010 procedure Claimant underwent. Thus, Claimant's claim for penalties on that basis is denied.

Remaining Issues

14. In light of the findings and conclusions made herein concerning the issue of waiver, Claimant's claim for attorney's fees and costs is denied. The Respondents did not file applications for hearing on issues that were not ripe. In addition, there is insufficient evidence in the record to support Claimant's claim for costs pursuant to §8-42-101(5), C.R.S. The issue of overpayment is also moot.

ORDER

It is therefore ordered that:

1. The Respondents' petition to reopen based on fraud is denied and dismissed.

2. The Respondents' petition to reopen based on Claimant's ability to return to employment is denied and dismissed.

3. Claimant is entitled to ongoing PTD payments consistent with the April 17, 2012 Final Admission of Liability.

4. Claimant's claim for penalties concerning the reduction in PTD beginning in February 2012 is denied and dismissed.

5. Claimant's claim for penalties concerning the failure of Respondents to pay PTD for 157 days is GRANTED. Respondents shall pay penalties in the amount of $7,850.00 to Claimant. None of the penalty shall be apportioned to the Subsequent Injury Fund.

6. Claimant's claim for penalties concerning the alleged failure of Respondents to properly fee schedule the procedure Dr. Bennett performed on April 28, 2010 is denied and dismissed.

7. Claimant's claim for attorney's fees and costs is denied and dismissed.

8. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 16, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has overcome the Division-sponsored Independent Medical Examination ("DIME") physician regarding the issue of whether claimant's right shoulder injury was caused by the admitted industrial injury by clear and convincing evidence?

- Whether claimant has overcome the DIME physician regarding the issue of whether claimant's right wrist injury was caused by the admitted industrial injury by clear and convincing evidence?

- Whether respondents have overcome the DIME physician by clear and convincing evidence regarding his opinion that claimant's need for oxygen is causally related to hiss work injury?

- Whether claimant has proven by a preponderance of the evidence that he is entitled to an award for disfigurement?

FINDINGS OF FACT

1. Claimant sustained a work related injury on March 19, 2010 when was riding as a passenger with a co-worker in a vehicle, when the co-worker lost control of the car and they were broad-sided by a pickup truck going about 65 to 70 miles per hour. Claimant testified at hearing that at the time of the injury, he was a passenger in a sports car and was wearing a seat belt. Claimant testified that at the time of impact, his hands hit the dashboard and the dashboard caved in. Claimant testified he injured his head, right shoulder; right arm, wrist and fingers, left hip, left knee and lower back in the accident.

2. Claimant received medical treatment at the scene of the accident. The EMS personnel noted that claimant complained of midline neck pain and the C5-6 level, thoracic pain anterior and posterior, right clavicle pain, left hip pain and left knee pain. Claimant was transferred to Littleton Adventist Hospital where he was treated for a concussion and right shoulder, neck, right chest, left clavicle, left knee and left hip pain.

3. Claimant began treating with Dr. Welling on March 26, 2010. Dr. Welling noted that claimant complaints of pain on palpation to his left thigh, and pain to his neck and low back. Dr. Welling recommended medications and released claimant to return to work full duty.

4. Claimant testified that when he returned home, his treatment was initially focused on the lower back and neck. Claimant testified he first noticed pain in his right wrist and thumb when he was back at work, still on crutches and had problems opening and closing valves because of pain in his wrist. Claimant testified he discussed his pain with Dr. Welling's office in April or possibly later. Claimant testified he noticed pain in his shoulder and could not reach to get supplies off the top shelf when he was back at work.

5. Claimant denied injuring either his right wrist, thumb or shoulder after the motor vehicle accident.

6. Claimant continued to treat with Dr. Welling for problems with his left hip, neck and back. Claimant was referred for chiropractic treatment. The chiropractic notes document claimant having ongoing complaints involving his neck and back areas. By April 9, 2010, claimant reported to Dr. Welling that he was feeling 100% better, but still reported a little soreness.

7. Claimant returned to Dr. Welling on May 21, 2010 and reported some problems with his memory. Dr. Welling recommended a referral to a neurological specialist.

8. Claimant returned to Dr. Welling on June 3, 2010 with continued complaints of memory problems and bilateral wrist pain. Dr. Welling recommended an electromyelogram ("EMG") of the right upper extremity and a brain magnetic resonance image ("MRI"). The EMG and MRI were both performed and interpreted to be negative.

9. Claimant was evaluated by Dr. Rivera on December 7, 2010 with complaints of neck pain and extremity pain right greater than left. Claimant reported having problems with his neck, right shoulder and arm and sometimes his left wrist. Claimant reported numbness in his firth forearm and hand. Dr. Rivera diagnosed myositis, cervicalgia and cervical radiculopathy and recommended a cervical MRI and physical therapy.

10. Respondents initially denied the claim to determine whether the claim was compensable. Respondents ultimately file a General Admission of Liability ("GAL") dated January 11, 2011 admitting for medical benefits only. Claimant did not receive medical treatment for his injury between July 14, 2010 and December 7, 2010 because of the denial of the claim.

11. Claimant returned to Dr. Rivera on January 13, 2011 and reported less numbness in his left hand and arm pain after physical therapy. Dr. Rivera diagnosed claimant with pain in his shoulder region. By February 24, 2011, Dr. Rivera noted claimant was complaining of continued neck pain with pain radiating down his right upper extremity in a C6-7 distribution. Dr. Rivera noted he might consider a repeat

EMG if claimant's symptoms persisted. Dr. Rivera recommended a cervical epidural steroid injection ("ESI").

12. Claimant returned to Dr. Rivera on March 29, 2011 with complaints of some residual right thumb pain. Claimant noted that the ESI provided relief for his other symptoms, but not the right thumb pain. Dr. Rivera referred claimant to Dr. Cortgageorge for counseling and continued claimant's medications. Dr. Rivera recommended an x-ray of claimant's right thumb.

13. On April 6, 2011, Dr. Rivera noted the x-ray revealed a carpal cyst of the scaphooid bone. Dr. Rivera noted this could be a result of trauma. Dr. Rivera referred claimant to an orthopedist for further evaluation.

14. Claimant was examined by Dr. Anderson with Durango Orthopedics on May 23, 2011. Dr. Anderson noted claimant complained of pain with a mild amount of swelling at the STT joint on the right side. Dr. Anderson noted claimant's x-ray revealed a nearly complete obliteration of the STT joint articulation space for the distal pole scaphoid cyst. Dr. Anderson recommended an injection to treat the severe arthritis.

15. Claimant returned to Dr. Anderson on July 7, 2011. Claimant noted he did well following the injection, but became severely symptomatic the previous weekend. Dr. Anderson recommended voltaren gel and a possible repeat injection.

16. Claimant was eventually referred to Dr. Orndorff in January 2012 by Dr. Anderson. Dr. Orndorff noted claimant's continued complaints of neck and shoulder pain with headaches and depression. Dr. recommended a repeat MRI of the cervical spine that was obtained on February 13, 2012. The MRI showed multilevel degenerative disc disease with facet joint arthropathy. Dr. Orndorff noted on his evaluation of claimant on February 13, 2012 that claimant continued ot have complaints of cervical spondylosis and cervical radiculopathy. Dr. Orndorff recommended a C4 to C7 cervical discectomy and fusion with interbody cage, allograft bone followed by laminectomy decompression and posterior instrumented fusion to address the central canal stenosis.

17. Claimant eventually underwent cervical spine surgery on December 14, 2012 under the auspices of Dr. Orndorff. The surgery included an anterior cervical decompression of the spinal cord at C5-C6, C6-C7 as well as C4-C5, anterior discectomy and arthodesis at C4-C5, C5-C6 and C6-C7, application of a PEEK interbody cage at C4-C5, C5-C6 and C6-C7, anterior instrumentation at C4-C5, C5-C6 and C6-C7, with allograft bone graft extender. This procedure was followed by a posterior approach with application and removal of Mayfield tongs and posterior instrumentation with Stryker Oasis cervical screws at C4, C5, C6 and C7, posterolateral cervical arthrodesis at C4-C5, C5-C6 and C6-C7, laminectomy and decompression of C4-C5, C5-C6 and C6-C7.

18. Dr. Dempsey was consulted following the surgery due to the fact that claimant's surgery took ten (10) hours and when claimant was extubated he was having significant pain and was given fentanyl and Dilaudid to help with his pain. Dr. Dempsey noted that claimant obstructed his airway and was not able to ventilate correctly. Dr. Dempsey noted that claimant's pre-operative screening was highly suggestive of sleep apnea and the sleep apnea was predisposing him to airway collapse when he received narcotics for his postoperative pain. Dr. Dempsey diagnosed post-operative respiratory failure and recommended claimant undergo an outpatient sleep study after his discharge.

19. The medical records contain documentation the claimant had a possible sleep apnea issue prior to the surgery, including the report from PA-C Baumchen dated September 21, 2012. Claimant denied at hearing having been diagnosed with sleep apnea prior to his surgery.

20. Following claimant's surgery, claimant began to complain of increasing problems with his right wrist. Claimant was examined by PA-C Gardner on February 4, 2013 with complaints of dorsal wrist pain after being transferred from a cast to a thumb spica brace following his surgery.

21. Claimant underwent an MRI of his right wrist on March 26, 2013. The MRI revealed a large tear of the central triangular fibrocartilage. Dr. Lindauer reviewed the MRI and diagnosed presumed postsurgical changes centered at the triscaphe articulations with severe arthrosis with a diffuse wrist synovitis. Dr. Lindauer also diagnosed a large tear of the central triangular fibrocarilage disc, moderate distal radioulnar joint arthrosis and mild tenosynovitis of the flexor tendons and 1st through 4th extensor compartment tendons at the level of the wrist that Dr. Lindauer noted was likely reactive.

22. Claimant underwent injections and physical therapy as treatment for the right wrist.

23. The medical records also document claimant developing right shoulder pain. PA-C Baumchen noted on July 18, 2013 that claimant reported increasing pain with tenderness over the bicipital groove and AC joints. Baumchen obtained x-rays of the right shoulder and noted that the x-rays showed degenerative changes with arthritic change though the AC joint. Claimant also began complaining of left shoulder pain and x-rays of the left shoulder showed mild AC arthritis. Claimant underwent an injection into the right shoulder on July 18, 2013.

24. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Jernigan on January 24, 2014. Dr. Jernigan noted claimant's mechanism of injury and his cervical disc injury resulting in surgery along with this right hand STT injury complicating arthritic problems in the hand now status post surgery. Dr. Jernigan further diagnosed claimant with a closed head injury, a history of depression that was

now stabilized and a low back injury that was likewise stabilized. Dr. Jernigan provided claimant with a PPD rating of 33% whole person. The impairment rating considered of 27% for the cervical spine. Dr. Jernigan also provided an impairment rating of 14% upper extremity for the wrist, that converted to an 8% whole person impairment rating. This combined with the 27% of the cervical spine for the 33% whole person impairment rating. Dr. Jernigan further noted that claimant continued to use a TENs unit and a CPAP unit and recommended both of these should be maintained as they were related to the injury.

25. Claimant returned to Dr. Anderson on May 23, 2014 with continued complaints of right shoulder pain. Dr. Anderson diagnosed claimant with a long head of biceps tendinitis with consideration for tendon sheath injection. Dr. Anderson noted that the physical findings were not consistent with a rotator cuff team, but referred claimant for an MRI of the shoulder. The MRI was performed on June 6, 2014 and demonstrated a near complete full thickness tear of the supraspinatus tendon retracted to the glenohumeral joint level. Dr. Anderson recommended shoulder surgery and noted that claimant had only very mild shoulder pain prior to the car accident and opined that the nature of the shoulder pain and severity increased dramatically after the injury.

26. In response to an inquiry from claimant's counsel, Dr. Jernigan opined on June 24, 2014 that there was a greater than 50% chance that the right shoulder rotator cuff injury did occur with the motor vehicle accident. Dr. Jernigan further recommended claimant undergo the surgery recommended by Dr. Anderson.

27. Dr. Jernigan issued another report on June 27, 2014 after examining claimant and noted that claimant was on crutches from his injury and reported his hip and shoulder have been sore since the accident and had not really improved that much. Dr. Jernigan recommended claimant continue with the CPAP machine and reiterated his opinion that claimant's right shoulder condition was related to his work injury.

28. Claimant underwent a DIME with Dr. Castrejon on July 2, 2014. Dr. Castrejon reviewed claimant's medical records, obtained a medical history from the claimant and performed a physical examination in connection with his DIME. Dr. Castrejon notes in his report with regard to the right shoulder that there is a lack of consistency with regard to the right shoulder complaints, noting that in some areas the records reflect complaints to the right shoulder and other records document complaints to the left shoulder. Dr. Castrejon notes that the initial records document complaints of shoulder pain, there is also documentation that the shoulder pain resolved following treatment that allowed for claimant to be released at MMI on April 9, 2010. Dr. Castrejon opined that this would be consistent with resovlement of uncomplicated straining injuries. Dr. Castrejon further noted that there was no further mention of should problems until the evaluation by Dr. Rivera on December 7, 2010, nine months after the injury.

29. Dr. Castrejon ultimately opined that claimant's shoulder condition was not related to the work injury of March 19, 2010. In coming to this conclusion, Dr. Castrejon noted that while claimant initially complained of some issues with his shoulder, he reported improvement following the chiropractic care and then didn't complain of ongoing shoulder problems until nine months post-accident. Likewise, Dr. Castrejon opined that claimant's wrist and thumb complaints were not causally related to the March 19, 2010 injury. Dr. Castrejon noted that osteoarthritis most commonly presents in the STT join which is often confused, clinically, with first CMC joint arthritis. Dr. Castrejon noted that while this can be related to trauma, he did not a sufficient reference to an acute injury to either wrist following the motor vehicle accident. Dr. Castrejon notes that the first reference to wrist pain was approximately 2 ½ months post accident. Dr. Castrejon noted that if the motor vehicle accident were responsible for claimant's wrist symptoms "coming to light", he would expect the symptoms would present themselves before 2 ½ months post accident. For these reasons, Dr. Castrejon opined that the motor vehicle accident did not aggravate claimant's underlying degenerative condition. Dr. Castrejon opined that it was medically probable that claimant experienced injuries to multiple parts of his body in the motor vehicle accident, but concluded that most of these injuries were minor strains and contusions that expectedly improved and subsequently resolved.

30. With regard to claimant's sleep apnea, Dr. Castrejon noted that claimant denied any preoperative respiratory issues. Dr. Castrejon further noted that following claimant's surgery, a critical care consult from Dr. Dempsey documents claimant having post operative respiratory failure requiring BIPAP. Dr. Castrejon noted that it was his opinion that were it not for the increase risk that claimant was subjected to during and following surgery the claimant would not have required treatment for an underlying asymptomatic sleep apnea.

31. Dr. Castrejon also noted that based on the neuropsychological evaluation that was completed, claimant would not qualify for the diagnosis of a mild traumatic brain injury as there had been no permanent sequelae. Dr. Castrejon provided claimant with a permanent impairment for the cervical spine that amounted to 27% whole person. Dr. Castrejon recommended maintenance medical care as recommended by Dr. Jernigan.

32. The ALJ notes that Dr. Castrejon's opinions regarding the causal relationship between claimant's wrist and shoulder injuries and the motor vehicle accident are based on the temporal relationship between claimant's accident and when he sought treatment for his injuries. This is likewise somewhat complicated by the fact that claimant did not receive medical treatment between July 2010 and December 2010 due to the fact that claimant's claim had been denied.

33. The ALJ finds the testimony of claimant to be credible and persuasive that he hit his hands on the dashboard during the motor vehicle accident. The ALJ further finds the testimony of claimant credible that he experienced pain in his hands and

shoulder shortly after the motor vehicle accident. The ALJ finds that claimant has sufficiently explained the lack of documentation in the medical records and finds that claimant has overcome the opinion of the DIME physician by clear and convincing evidence regarding the relatedness of the wrist and shoulder complaints.

34. The ALJ notes that the initial medical records from Littleton Adventist Hospital document claimant complaining of right shoulder pain. The ALJ further credits claimant's testimony that he noticed continued problems in his right shoulder when returning to work and being unable to lift supplies off the higher shelves. The ALJ therefore finds that claimant has demonstrated that it is likely true and free from substantial doubt that he injured his shoulder and wrist in the March 19, 2010 motor vehicle accident.

35. Respondents argue that Dr. Castrejon's opinion that claimant's need for oxygen for his sleep apnea issues has been overcome by clear and convincing evidence. The ALJ is not persuaded.

36. Dr. Castrejon's opinion regarding relatedness of the sleep apnea is again based on the temporal relationship between claimant's onset of symptoms that resulted in the need for the sleep apnea treatment and the surgery that included and extended period of anesthesia. While claimant may have had issues with sleep apnea symptoms prior to the surgery, there was no need for treatment for the possible sleep apnea until after the surgery. Therefore, the ALJ finds that respondents have failed to demonstrate that Dr. Castrejon's opinion regarding the cause of the sleep apnea has been overcome by clear and convincing evidence.

37. As a result of claimant's surgery, claimant has a surgical scar on the back of his neck measuring six (6) inches in length and one (1) inch in width. Claimant also has a surgical scar on the front of his neck measuring three (3) inches in length and 1/8 inch in width. The ALJ finds that claimant has proven that he suffered disfigurement that is normally exposed to public view as a result of his injury. Claimant likewise has a surgical scar measuring 2 ½ inches in length and 1/8 inch in width on his right wrist. Due to the fact that the ALJ finds that the claimant has overcome the opinion of Dr. Castrejon regarding the relatedness of the right wrist, the ALJ will award disfigurement for the right wrist scar.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo.

306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, the ALJ credits the testimony of claimant regarding the onset of his symptoms in his right shoulder and right wrist and determines that claimant has proven by clear and convincing evidence that the right shoulder and right wrist are causally related to the industrial injury.

6. As found, respondents have failed to overcome the opinion of Dr. Castrejon by clear and convincing evidence regarding the relatedness of claimant's sleep apnea condition.

7. Pursuant to Section 8-42-108, C.R.S., 2009 Claimant is entitled to a discretionary award up to $4,286.00 for his serious and permanent bodily disfigurement that is normally exposed to public view. Considering the size, placement, and general

appearance of Claimant's scarring, the ALJ concludes Claimant is entitled to disfigurement benefits in the amount of $1,714.40, payable in one lump sum.

ORDER

It is therefore ordered that:

1. Claimant's wrist and shoulder injuries are a compensable component of the March 19, 2010 industrial injury.

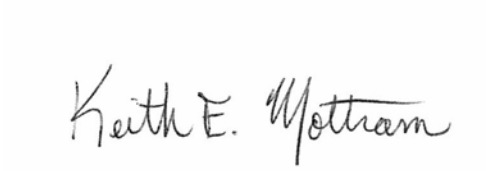
2. Respondents shall pay $1,714.40 to claimant for disfigurement for the scars to claimant's neck and wrist.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 6, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

The issue for determination is the reasonableness and necessity of medical benefits to include the toxicology screen by Rapid Tox Screen for the date of service of June 16, 2014, topical cream prescriptions for AB8 Ketamine 10%, BB3 Tramadol 10%, MS2-MethylPyridHydrox and AB5-KGDBLC, as well as the reasonableness and necessity of continued Lyrica, Morphine, and Celebrex.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was injured on or about June 7, 2011. Claimant sustained a back injury and underwent a L3-L5 decompression.

2. Claimant takes Lyrica and Celebrex twice per day and Flexeril at night for pain relief. The medications help with his aches and pains in his back and legs. He uses Morphine sparingly and only in cases of extreme pain caused by increased activity. If he goes without Lyrica and/or his Celebrex, for two to three days, his pain levels increase, especially in his back and legs. Claimant testified that he has "good days" and "bad days." On a good day, claimant deals with his pain, runs errands and does things around the house. On bad days claimant is laid up on the couch using heat/ice to assist in managing his pain. The ALJ finds from claimant's testimony that he likely takes Morphine on bad days in order to control his pain levels in an effort to remain as functional as possible. Based upon the medical records documenting the nature and extent of Claimant's injury and his subsequent treatment, the ALJ finds Claimant's testimony regarding his need for ongoing medications and the effectiveness of previously prescribed medications credible and persuasive.

3. Dr. Ridings placed claimant at MMI on June 6, 2012. Claimant was provided maintenance medication consisting of Lyrica, Morphine and Diclofenac.

4. By report dated June 28, 2012, Dr. Ridings reviewed video surveillance. Based on the videotape surveillance, Dr. Ridings reevaluated claimant's medication needs, his impairment rating, and retracted his previous opinion regarding claimant's need for possible additional surgery.

5. On July 10, 2012, drug testing was performed which did not detect the presence of Morphine.

6. On July 13, 2012, Dr. Ridings issued a report indicating that he prescribed Morphine (60 tablets) on April 3, May 1, May 23 and June 20, 2012. He indicated Morphine doses should be decreased if claimant did not need them within the two- to four-day window, which Dominion Diagnostic states that Morphine would be detectable by the assay.

7. Dr. Ridings indicated on July 19, 2012 he was decreasing claimant's Morphine as he was concerned about claimant's lack of severe functional limitations which were not apparent on recent surveillance videotape and his need for Morphine.

8. On October 24, 2012, claimant underwent a Division IME with Dr. Sandell. On that date, claimant reported pain levels of 7/10 at rest, and 8-9/10 with activity. Physical examination showed tenderness in the paraspinal muscles of the lumbosacral region bilaterally. Claimant had no focal trigger points, good motor strength without any focal motor weakness or muscle atrophy, grossly intact light sensation, and diminished reflexes bilaterally. Claimant had a negative straight leg raise on the right and a positive straight leg raise on the left. Dr. Sandell provided the claimant with 15% whole person impairment.

9. On December 12, 2012, Dr. Ridings noted that he was not convinced that claimant really required opiates, given the issues discussed at length regarding the surveillance videotape. Additionally, on his most recent urine drug test screen at a time when claimant told Dr. Ridings he was taking Morphine daily, Morphine was not found in his urine on two separate tests.

10. Dr. Ridings retired from active practice. Consequently, claimant's ongoing care was transferred to Dr. George Johnson. Dr. Johnson first saw the claimant on June 3, 2013. At that time, claimant reported pain levels 9/10 at worst, and 8/10 on average. Dr. Johnson recommended physical therapy and injections and referred claimant to Dr. Joseph Brooks.

11. Dr. Brooks' specialty is in interventional pain management. He is board certified in internal medicine and pain management. He evaluated claimant on July 29, 2013. During this appointment claimant reported pain radiating down both legs, worse with prolonged sitting or standing and driving a car. He was taking Lyrica, Celebrex and opiates (Morphine) sparingly. Drug testing performed on that day was positive for Lyrica and Morphine.

12. On November 5, 2013, claimant continued to report pain levels of 8/10 at worst, and 8/10 on average. Claimant was taking Lyrica, Celebrex, Morphine and was also prescribed Flexeril. By letter dated November 18, 2013, Dr. Johnson indicated that he had not prescribed any narcotic medication.

13. Dr. Brooks saw the claimant again on December 16, 2013 and requested a drug test. On that day, claimant's pain levels were 8/10.

14. Drug testing performed on December 16, 2014 was negative for Morphine and positive for Lyrica and Flexeril.

15. Dr. Brooks reevaluated claimant on June 16, 2014 during which appointment claimant reported his pain level was 9/10. Physical examination revealed tenderness in the right back and buttock. The remainder of the examination was normal. Dr. Brooks renewed claimant's Lyrica, Flexeril and Morphine and added a prescription of topical creams, including MS2-Methyl Pyrid Hydrox, AB8 Ketamine 10%, AB5-KGDBLC, and BB3 Tramadol 10%.

16. Dr. Brooks requested drug testing, which was performed on June 16, 2014. The testing was negative for all drugs previously prescribed.

17. Dr. Bisgard performed an independent medical examination (IME) for respondent on January 13, 2014. Dr. Bisgard has a specialty in physical medicine and rehabilitation (PM&R). While she treats patients with chronic pain conditions, she is not board certified in pain management. During his IME claimant reported 8-9/10 level pain with increased activity. On the date of his examination, claimant reported a pain level of 8/10. Dr. Bisgard's reached the following diagnostic impression following completion of her IME: L3-4 and L4- 5 disc bulge with mild retrolisthesis, bilateral lower extremity paresthesias, deconditioning, and possible Charcot-Marie-Tooth syndrome. Claimant was taking Lyrica, Cyclobenzoprine (Flexeril), Celebrex, and Morphine. Regarding the continued use of medications previously prescribed, Dr. Bisgard originally recommended tapering and discontinuing the use of Morphine but recommended that claimant continue taking Celebrex "as it is reasonable". Dr. Bisgard also recommended Lyrica be continued, as "He appears to be getting the best relief with Lyrica." However, Dr. Bisgard has since changed her opinion regarding the continued use of Lyrica and Celebrex.

18. In a subsequent report and during her testimony, Dr. Bisgard indicated it was difficult to determine how much pain and limitation claimant actually had. She reviewed the video surveillance from November 2013 in which claimant was observed sitting and standing at a football game without apparent discomfort. He was also observed sitting in a forward flexed position on a split rail fence without apparent difficulty. Dr. Bisgard testified that physicians determine if prescribed drugs are effective, by a decrease of pain and a corresponding increase in function. Function is not based solely on return to work, but on ability to function with activities of daily living. It was her opinion that at no point did claimant demonstrate pain behaviors, and even when reporting his pain level at 8/10, he did not display any behavior suggesting pain at that level. Consequently, Dr. Bisgard noted: "Due to lack of benefit with the medications including pain relief and/or functional improvement, I recommend the morphine be tapered and stopped as well as the Celebrex." In the final paragraph of her report, Dr. Bisgard expands this list to include Morphine, Celebrex, Lyrica, and Flexeril, stating as the medications are not reducing pain or increasing function, they should be discontinued. Dr. Bisgard recommended a home exercise program, over-the-counter medication, and Flexeril PRN. The ALJ is not persuaded by respondent's suggestion

that Claimant's negative drug testing results is conclusive evidence that the aforementioned medications are not reasonably necessary. Given claimant's testimony that he uses Morphine sporadically, has addiction concerns and has good days and bad days, the ALJ is not surprised by the results of claimant's drug testing. Based upon the evidence presented, including claimant's testimony, the ALJ finds, more probably than not, that the aforementioned medications are likely helping with pain control and maintaining his level of functioning. The ALJ finds that without these medications, including the occasional dosage of Morphine, claimant's average pain levels will likely increase on a daily basis and his level of functioning will deteriorate. Accordingly, the ALJ finds the continued use of Lyrica, Celebrex, Morphine and Flexeril reasonably necessary and related to claimant's industrial injury.

19. The cost of a 30 day supply of the aforementioned topic drugs prescribed is as follows: MS2-Methyl Pyrid Hydrox, $5,825.10; AB8 Ketamine 10%, $903.60; AB5-KGDBLC, $2,756.40; BB3 Tramadol 10%, $1,465.80. The total cost of a 30-day supply of these prescriptions is $10,950.90.

21. Dr. Brooks testified that claimant's diagnosis was radiculopathy and low back pain. During his deposition, Dr. Brooks explained that Ketamine 10% is a topical compound for pain control. Dr. Brooks testified that he routinely prescribes this compound, as part of his standard practice, to his patients with success. Dr. Brooks also testified the Tramadol 10% was prescribed as an additional topical medication to alleviate pain and prevent the need for stronger opiate medications. According to Dr. Brooks this medication is to be used in conjunction with the Ketamine. Dr. Brooks also addressed the prescription for MS2-methyl pyrid hydrox. Per Dr. Brooks, this prescription is for nerve pain and contains a high amount of folic acid, B12 and B6 vitamins and is reasonably necessary to address/treat Claimant's ongoing nerve pain. Dr. Brooks testified that the use of the aforementioned topical creams in this case would be considered an off label use of the medications. He testified that he prescribed the creams in an effort to focus treatment to the regional area of claimant's pain and avoid the side effects attendant with oral medications.

22. Dr. Bisgard testified that she was not familiar with these particular topical medications and had no experience with them. In fact, Dr. Bisgard had to look up the medications and call a pharmacist to investigate the compounds in question. After conducting her investigation, Dr. Bisgard was informed as to what active components were in the compounded creams. She testified that the topical creams contain duplication within the different prescriptions written by Dr. Brooks. Specifically, there is Ketamine in two of the creams, and two muscle relaxers in one of the creams - Cyclobenzoprine and Baclofen. According to Dr. Bisgard, the creams also contained medications which the claimant was also taking orally –Gabapentin-Lyrica (oral); Cyclobenzaprine/Baclofen-Cyclobenzaprine (oral), Diclofenac-Celebrex (oral). Dr. Brooks testified to these same facts. After determining what was in the compounded creams, Dr. Bisgard preformed a medical literature review to determine the use and effectiveness of these topical agents in the treatment of back pain and/or radiculopathy. Based on the medical studies that Dr. Bisgard reviewed, she testified that there was no

support for the use of these topical medications for radiculopathy or low back pain. Dr. Bisgard testified that the *Medical Treatment Guidelines* limit the use of topical Ketamine to neuropathic disorders such as CRPS. According to Dr. Bisgard, claimant does not have neuropathic pain or CRPS and the topical use of this drug (Ketamine) would not help treat radiculopathy because a topical compound cannot penetrate to the level of the nerve root. Per Dr. Bisgard the *Medical Treatment Guidelines* do not recommend the use of topical agents for the specific conditions claimant has. In addition, the *Medical Treatment Guidelines* stated that no studies identified evidence for the effectiveness of compounded topical agents other than those recommended. Therefore, other compounded topical agents were not generally recommended. Based upon the fact that the some of the medications in the topical creams were duplicates of each other and the oral medications claimant had already been prescribed and because claimant did not have a medical condition for which the use of topical medications were recommended or effective in treating, Dr. Bisgard testified that the topical agents prescribed by Dr. Brooks were not reasonable or necessary.

23. Dr. Brooks also requested a drug test through Rapid Tox Screen. The test was comprised of a panel of 48 drugs including common street drugs, such as heroin and ecstasy. Dr. Brooks indicated this extensive drug testing was needed to make sure patients are not using drugs or other medications that they are not telling him about. He requested this confirmatory laboratory testing because he is dealing with patients with chronic pain. Because the claimant was taking Morphine sporadically, Dr. Brooks indicated the test would be either positive or negative. Based on a negative test, he is looking for confirmation of a minute amount of the medication in the system. He also indicated that this population has a higher risk of abusing drug and although he had no suspicion the claimant was actually abusing drugs, he suspects everyone he prescribes opiates to. Although Dr. Brooks indicated that he could narrow the panel to give him information needed, he testified that he casts a "broad network" with every patient that he sees to assure that patient is not "diverging" from what they tell us by using illicit medications/drugs. The cost of the Dr. Brooks drug test was $5,210.00.

24. By letter dated October 9, 2014, Ms. Madsen denied the drug-screening test from Rapid Tox Screen. Respondent sought review of Dr. Brooks request for a 48 panel drug test by Dr. Alan Burgess.

25. Dr. Burgess reviewed the 48-drug panel requested and opined that the number of tests and the cost of the evaluation exceeded necessary medical monitoring and the testing was out of proportion to the number of drugs being given. Claimant was being prescribed three medications, only one of which was a scheduled II drug – Morphine. Per Dr. Burgess, the other 47 drugs tested for were excessive, unnecessary, and the cost was unreasonable. Dr. Burgess testified that testing included drugs not prescribed, metabolites of drugs not prescribed and drugs that were outdated and not in use any longer. He noted that claimant really wasn't following through in filling his prescriptions, which was exactly the opposite of what usually happens when physician drug-monitored testing is requested. He indicated that a 10-panel drug test is the standard for assuring compliance with health care opiates. According to Dr. Burgess, A

10-panel test covers the main illicit drugs, main prescription drugs, and major prescription drugs of abuse. A 10-panel drug test costs in the range of $11.50-$15.00. This would include all of the physical characteristics of the urine, which are included for free. Dr. Burgess opined that it would be reasonable for a physician to limit a confirmatory test to a specific drug. A confirmatory test would cost in the range of $150.00. The ALJ credits Dr. Burgess' testimony to find that a 48-panel drug test under the circumstances presented in this case is unreasonable.

26. Claimant has failed to prove by a preponderance of the evidence that the topical drugs AB8 Ketamine, BB3 Tramadol, AB5-KGDBLC and MS2 Methyl Pyrid Hydrox are reasonable and necessary. The ALJ finds Dr. Bisgard's testimony that claimant does not have a medical condition which would be amenable to treatment with the use of topical agents persuasive. Moreover and importantly, while the Medical Treatment Guidelines are advisory and can be deviated from when appropriate, Claimant has failed to make a persuasive case that the use of topical agents is reasonably or necessary here. To the contrary, outside of Ketamine, the medications in the compounded creams are duplicative of those oral medications, which have proven effective in treating and maintaining his condition. Regarding the need for Ketamine, Claimant testified that he rarely uses an opiate for pain control. He is not contending that the Morphine is ineffective in controlling his pain. Rather, he testified that the Morphine is very helpful for him. He has requested an order for ongoing Morphine as it has assisted in controlling his pain and given him the benefit of improved function. Accordingly, the ALJ is convinced that it is unnecessary to add another potent pain medication to claimant's treatment regime. Also, it is persuasive that MS2 Methyl Pyrid Hydrox is a vitamin B12 complex for which Dr. Brooks cited only anecdotal medical literature as bestowing pain relief properties.

27. Claimant has failed to prove by a preponderance of the evidence that the Rapid Tox Screen 48-panel drug test is reasonable and necessary. The opinion of Dr. Burgess is persuasive that the testing was out of proportion to the number of drugs being prescribed and the circumstances in this case. While it is reasonable for Dr. Brooks to request drug testing to confirm the appropriate use of medications prescribed in this case, the ALJ finds, absent a reasonable suspicion that claimant is abusing or diverting his medications, casting a "broad network" as wide as that thrown here unreasonable. Dr. Brooks made no effort to tailor the requested testing in this case to the actual scheduled II drug in which the claimant was being prescribed. Rather, he simply indicated that he is suspicious of anyone he prescribes to. The ALJ finds such assertion incredible to support a request for a 48-panel drug test in light of the circumstances in this case, including those cited by Dr. Burgess.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301(1)(c); *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Walmart Stores v. Industrial Claim Appeals Office*, 989 P.2d 521 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). This includes establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

B. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondent. § 8-43-201(1).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, civil 3:16 (2005).

D. Claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

E. In deciding whether Claimant has met her burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

F. The mere occurrence of a compensable injury does not require an ALJ to find

that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013.

G. As found, the evidence in the instant case demonstrates that prescriptions for Celebrex, Lyrica, Flexeril and Morphine are likely helping claimant with pain control and are responsible to his level of function. The ALJ is not convinced that claimant's pain levels and functionality would be the same with or without these medications. The ALJ concludes that without these medications, including the occasional dose of Morphine, claimant's average pain levels will likely increase on a daily basis and his level of functioning will deteriorate. Accordingly, the ALJ concludes that the continued use of Lyrica, Celebrex, Morphine and Flexeril is reasonably necessary and related to claimant's industrial injury.

H. However, the addition and administration of topical creams, including MS2-ethyl Pyrid Hydrox are not reasonable or necessary to maintain MMI. The use of the MS2-Methyl Pyrid/Hydrox, AB8 Ketamine, AB5-KGDBLC, and the BB3 Tramadol are off-label use of the drugs prescribed. The use of such compounds to treat claimant's conditions in this case is not supported by studies or by the *Medical Treatment Guidelines*. Moreover, these topical creams contain the same medications proven to be effective in treating claimant's pain and maintaining his current level of function. Consequently, the ALJ concludes it is not reasonably necessary to add additional medications to his treatment regime. Furthermore, while it is reasonable for Dr. Brooks to request drug testing to confirm the appropriate use of medications prescribed in this case, his request for 48-panel drug testing is unreasonable in light of the circumstances presented in this case. As found, the ALJ credits the testimony of Dr. Burgess to conclude that a 10-panel drug test which would covers the main illicit drugs, main prescription drugs, and major prescription drugs of abuse followed by a confirmatory test was all that was necessary in the instant case.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits in the form of the topical creams and the MS2-Methyl Pyrid/Hydrox is denied and dismissed.

2. Claimant's claim for medical benefits in the form of payment for the Rapid Tox Screen drug testing is denied and dismissed.

3. Respondent's shall pay for ongoing prescriptions of Celebrex, Lyrica, Morphine Sulfate and Flexeril as these medications continue to be reasonably necessary to cure and relieve claimant of the effects of his industrial injury.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 5, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Respondents have established by a preponderance of the evidence that Claimant has fraudulently obtained benefits and compensation by willfully misrepresenting her physical condition to her treating physicians in violation of §8-43-402, C.R.S.

2. If Claimant has committed fraud in violation of §8-43-402, C.R.S., whether Respondents are entitled to the retroactive recovery of indemnity and medical benefits paid to Claimant.

3. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant's July 24, 2013 physical altercation with Marie Friedstein constituted a subsequent intervening event that permits them to withdraw their admission of liability.

4. Whether the temporary disability benefits that Respondents have paid Claimant since the July 24, 2013 altercation constitute an overpayment.

5. Whether Claimant has proven by a preponderance of the evidence that the requested surgical procedures for her shoulder, hip and ankle from the physicians at Western Orthopedics are reasonable, necessary and related to her October 6, 2011 industrial injuries.

FINDINGS OF FACT

1. Employer is a major food distribution and restaurant supply corporation headquartered in Houston, Texas. Claimant worked for Employer in its Denver, Colorado facility as a Product Demonstrator and Sales Marketing Associate for approximately four months. Claimant no longer works for Employer.

2. On October 6, 2011 Claimant slipped and fell on a wet floor on Employer's premises during the course and scope of her employment. Claimant sustained contusions to her right shoulder, right wrist, right elbow and right hip. Respondents admitted liability for the claim and Claimant presented to her authorized treating physicians for conservative treatment and management of her injuries.

3. Claimant's main concerns in the months following her injuries were her right shoulder and right upper extremity. Claimant's complaints to her right wrist and right elbow dissipated but she had persistent pain over the posterolateral shoulder with elevation of her arm. She eventually obtained an MRI of her right shoulder on December 20, 2011. The MRI revealed a non-displaced SLAP type labral tear from the biceps labral anchor throughout the posterior superior quadrant. There was no

extension of the tear into the biceps tendon. Claimant was eventually referred to Rajesh Bazaz, M.D. for an evaluation. He recommended arthroscopic surgery to repair the tear in the right shoulder.

4. On January 26, 2012 Claimant underwent an MRI of her right hip. The MRI revealed moderate osteoarthritis of the hip. There was a small focus of degenerative subcoritcal cystic change in the anterior lateral femoral head neck junction but no focal bony bump or other definitive findings for femoral acetabular impingement pattern.

5. On February 23, 2012 Claimant underwent right shoulder surgery. She was placed in a sling and subsequently received conservative care from her treating physicians. On March 20, 2012 Respondents filed a General Admission of Liability (GAL) acknowledging Temporary Total Disability (TTD) benefits from the date of surgery and continuing.

6. Following surgery Claimant experienced continued discomfort in her right shoulder and increasing pain in her right hip. Throughout the rest of 2012 Claimant continued to receive conservative care from her treating physicians. She underwent a series of nerve blocks without a positive response. Claimant's pain continued to increase and her treating physicians suspected possible Chronic Regional Pain Syndrome (CRPS).

7. On November 20, 2012 Claimant visited Ricky Artist, M.D. for a follow-up evaluation. Claimant reported to Dr. Artist that on November 17, 2012 her right hip "locked-up" and she fell to the ground severely spraining her left ankle. X-rays of Claimant's left ankle showed no evidence of a bony injury.

8. On December 13, 2012 Claimant underwent an MRI for her left ankle. The MRI revealed that Claimant had a tear in her anterior talofibular ligament and partial tearing of the peroneus longus tendon.

9. On March 11, 2013 Claimant visited Tashof Bernton, M.D. for an evaluation and CRPS testing. Based on the testing results Dr. Bernton concluded that Claimant did not meet the Medical Treatment Guidelines for diagnosis of CRPS because she had only one out of three positive tests. Dr. Bernton noted that Claimant had potential frozen shoulder. Claimant continued to receive conservative treatment during the remainder of 2013.

10. On July 24, 2013 Claimant was involved in a public altercation in Cherry Creek at approximately 10:30 p.m. with another woman. Cell phone video captured the altercation. Court documents from the City and County of Denver District Attorney's Office identify Claimant and Marie Friedstein as the individuals fighting in the video.

11. Claimant testified at hearing that she is depicted in the video wearing beige high heel stiletto shoes and a dress. Claimant identified the other woman in the video as Ms. Friedstein. Claimant is seen on the video wrestling Ms. Friedstein to the ground. On a second clip Claimant is seen approaching Ms. Friedstein from behind,

grabbing her by the shoulders and throwing Ms. Friedstein forcibly to the ground. Claimant then sits on top of Ms. Friedstein in a straddling position and proceeds to use her right upper extremity to repeatedly punch her in the head and upper torso area. Claimant delivers approximately 11 punches to Ms. Friedstein without any hesitation, pain, or restriction of motion in her right upper extremity. She also walks freely with both of her lower extremities, has no problems with her left ankle and, on several occasions, is able to plant her lower extremities and rotate her body.

12. On August 28, 2013 Claimant presented to Kevin Smith, M.D. for a follow-up examination. She reported that she was continuing to have pain and difficulties with her right upper extremity. Claimant specifically noted that she was having such sensitivity with her right upper extremity that "anything even lightly touching her skin" would cause bothersome symptoms. Claimant also noted to Dr. Smith that she had a previous sprain of her left ankle "which had mostly resolved." Claimant did not report the July 24, 2013 altercation.

13. On October 10, 2013 Claimant underwent an independent medical evaluation with L. Barton Goldman, M.D. Dr. Goldman determined that Claimant did not have CRPS but instead had myofascial pain and upper trunk plexus irritation. He expressed concerns that Claimant was suffering from right adhesive capsulitis or frozen shoulder. Dr. Goldman also remarked that Claimant suffers from "right hip osteoarthritis pre-existing and aggravated by work related injury October 6, 2011 with acetabular impingement." Dr. Goldman summarized that Claimant's mechanism of injury was most consistent with "contusions of the right upper trunk of the brachial plexus, the right shoulder and right hip." He expressed "significant concerns" regarding whether Claimant would tolerate invasive interventions because of her conflicted responses to suggestions and pain management struggles.

14. On November 11, 2013 Claimant underwent an independent medical examination with Floyd O. Ring, M.D. Dr. Ring agreed that Claimant did not meet the definition of CRPS pursuant to the Medical Treatment Guidelines. He also noted that Claimant demonstrated inconsistencies between her presentation and ranges of motion. Dr. Ring commented that Claimant walked with a significant antalgic gait favoring the right lower extremity. He viewed surveillance video of Claimant in which she was walking in high-heeled boots without any apparent difficulties. Dr. Ring expressed concerns of "possible symptom magnification, secondary gain issues or somatization versus malingering." Dr. Ring was unaware of the altercation that took place on July 24, 2013 and the existence of any video of the event.

15. On May 19, 2014 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian released his report on July 10, 2014. Dr. Cebrian was aware of the cell phone video of the altercation involving Claimant and Ms. Friedstein that had surfaced shortly after his examination took place. Dr. Cebrian reviewed additional surveillance of Claimant that had been referenced by Dr. Ring in November 2013. He concluded that Claimant was at Maximum Medical Improvement (MMI) and she did not require additional treatment for her injuries. Dr. Cebrian determined that Claimant's subjective complaints were out of proportion to the

objective findings especially in light of the video showing the July 24, 2013 altercation and the surveillance footage of Claimant from 2013. Dr. Cebrian noted that Claimant had provided exaggerated and inaccurate information to her medical providers throughout the claim. Based upon the inconsistencies in the videos, surveillance of Claimant and her statements to treating physicians, Dr. Cebrian was concerned with symptom magnification, secondary gain issues, somatization and malingering. Dr. Cebrian also noted that none of Claimant's subjective complaints constituted injury-related conditions but were maladaptive coping mechanisms as noted by Dr. Goldman.

16. On July 9, 2014 Dr. Ring issued a second report based on the review of additional medical records and two videos of the July 24, 2013 altercation involving Claimant and Ms. Friedstein. Dr. Ring noted that in the July 24, 2013 video Claimant "shows no decreased range of motion involving the hip, ankles or right upper extremity." He emphasized that Claimant's actions in the videos were inconsistent with her medical records and his physical examination. Dr. Ring specifically noted that Rajesh Bazaz, M.D. had requested surgical intervention based on Claimant's right adhesive capsulitis or frozen shoulder. However, because the videos depicted Claimant "repetitively flex[ing], extend[ing] and abduct[ing]" her right shoulder she did not have any right shoulder limitations and any shoulder surgery was not causally related to her October 6, 2011 industrial injuries.

17. On August 12, 2014 Claimant underwent an examination with Kevin Nagamani, M.D. regarding her left ankle condition. Dr. Nagamani recommended surgery to Claimant's left ankle involving arthroscopy and debridement of the lateral portion of the ankle and a Brostrom repair. He was not aware of the altercation on July 24, 2013, cell phone video and surveillance footage taken in 2013.

18. On October 7, 2014 the parties conducted the pre-hearing evidentiary deposition of Dr. Nagamani. He received the opportunity to review the November 4, 2013 surveillance footage as well as video of the July 24, 2013 altercation. Dr. Nagamani maintained that Claimant had objective evidence and pathology in the left ankle requiring surgical repair. However, after reviewing the videos, he could not state within a reasonable degree of medical probability that the objective pathology of Claimant's left ankle was related to the November 17, 2012 event in which Claimant's hip "locked up." Dr. Nagamani stated that the videos demonstrate that Claimant did not have an altered gait, appeared to walk fluidly and did not demonstrate instability in her left ankle.

19. On October 10, 2014 the parties conducted the pre-hearing evidentiary deposition of Dr. Bazaz. Dr. Bazaz recounted that he had performed right shoulder surgery on Claimant on February 23, 2012. She then visited him a few more times until June 18, 2012. He had diagnosed Claimant with frozen shoulder and attributed her condition to the October 6, 2011 industrial slip and fall. Dr. Bazaz did not again see Claimant until June 2014. Dr. Bazaz stated that Claimant demonstrated greater flexion and extension with her right shoulder than she did during subsequent examinations with him in 2014. He noted that objective pathology was present in Claimant's shoulder and he suspected adhesive capsulitis. Dr. Bazaz explained he could not make a

determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. He declined to provide an opinion regarding causation of Claimant's right shoulder complaints.

20. Claimant testified at the hearing in this matter. She explained that she was still having problems with her right upper extremity and particularly her right shoulder. Claimant also remarked that her right hip pain has worsened in the last several months and she is still experiencing pain in her left ankle. She requested authorization for the procedures recommended by Drs. Bazaz and Nagamani as well as treatment for her right hip.

21. Dr. Ring testified at the hearing in this matter. He consistently maintained that Claimant's current right shoulder symptoms are not related to her October 6, 2011 industrial injury. Dr. Ring specifically detailed that Claimant underwent right shoulder surgery, her symptoms resolved and she has no ongoing shoulder pathology. He specified that right shoulder manipulation under anesthesia will not benefit Claimant because her shoulder symptoms either resolved prior to the July 24, 2013 altercation or her symptoms were aggravated as a result of the altercation. Dr. Ring explained that Claimant's subjective complaints were grossly disproportionate to the objective evidence in the videos of the altercation and the surveillance of Claimant in 2013. He testified that the functional abilities of Claimant on the video of the altercation are significant because she would have guarded her upper extremity or refrained from using her upper extremity if her subjective complaints were legitimate. Dr. Ring testified that Claimant exhibited no pain behaviors and demonstrated complete use of her upper extremity during the altercation. He noted that Dr. Bazaz failed to perform a causation analysis prior to recommending right shoulder surgery. Dr. Ring commented that Claimant would benefit from an EMG to rule out any potential conditions to her right shoulder.

22. Marie Friedstein testified in this matter by video deposition. She explained that she was involved in an altercation with Claimant on July 24, 2013. Ms. Friedstein remarked that Claimant attacked her and wrestled her down to the ground. She commented that Claimant repeatedly punched her in the face. Ms. Friedstein testified that she sustained three cracked ribs, broke her collarbone in four places and suffered five contusions to her head. She explained that Claimant did not appear to have any injuries to her right shoulder, right hip, or left ankle.

23. Ms. Friedstein also testified regarding Claimant's other activities during the time Claimant was disabled and receiving TTD. Ms. Friedstein confirmed that Claimant was present at the CU Boulder dorms in August 2012 along with herself, her husband and other individuals. Ms. Friedstein testified that Claimant was helping to move certain belongings into the dorm rooms. One of the items was a large loveseat. Ms. Friedstein testified that several people assisted in the moving of the loveseat since it had become lodged between the doors in the hallway leading into the dorm room. Ms. Friedstein confirmed that Claimant was assisting in the moving of the loveseat using her right upper extremity in an unrestricted manner. She testified that Claimant was not wearing a sling and did not appear to have any pain in her right upper extremity or right hip.

24. Dr. Cebrian testified through a post-hearing evidentiary deposition in this matter on November 8, 2014. He explained that the recommended procedures from Drs. Bazaz and Nagamani, as well as additional treatment to Claimant's hip was not reasonable, necessary or related to her October 6, 2011 industrial injuries. Dr. Cebrian testified that Claimant's ongoing pathology in her right shoulder is likely due to adhesive capsultitis. He remarked that,. based upon the evidence in the video, Claimant's functional abilities and the medical records, the ongoing pathology in the right shoulder is not related to the original October 6, 2011 slip and fall. Dr. Cebrian also explained that Claimant's right hip pathology is likely related to the natural progression of a degenerative condition not related to the original October 6, 2011 event. With regard to the left ankle, Dr. Cebrian explained it was unlikely that Claimant's right hip "locked-up" causing her to fall and twist her ankle. He maintained that treatment for the left ankle is not related based on the functional abilities that Claimant demonstrated during the altercation on July 24, 2013 and the surveillance footage from November 4, 2013.

25. Respondents have failed to establish that it is more probably true than not that Claimant has fraudulently obtained benefits and compensation by willfully misrepresenting her physical condition to her treating physicians in violation of §8-43-402, C.R.S. On October 6, 2011 Claimant slipped and fell on a wet floor on Employer's premises during the course and scope of her employment. Claimant sustained contusions to her right shoulder, right wrist, right elbow and right hip. Respondents admitted liability for the claim and Claimant presented to her authorized treating physicians for conservative treatment of her injuries. On February 23, 2012 Claimant underwent right shoulder surgery but subsequently continued to experience right shoulder symptoms. Claimant's physicians considered whether she was suffering from CRPS but determined through testing that she did not have the condition. Because subsequent conservative measures failed, Claimant's treating doctors ultimately sought authorization for surgery for her shoulder, hip and ankle. Although Respondents have produced evidence through physicians that surgery is not reasonable, necessary and related to Claimant's October 6, 2011 industrial injury, they have failed to demonstrate that Claimant has fraudulently obtained medical benefits. Specifically, Respondents have failed to prove that Claimant falsely misrepresented a material fact to obtain indemnity and medical benefits. Accordingly, Respondents are not entitled to retroactive recovery of benefits paid to Claimant.

26. Respondents have failed to demonstrate that it is more probably true than not that Claimant's July 24, 2013 physical altercation with Ms. Friedstein constituted a subsequent intervening event that permits them to withdraw their admission of liability. On July 24, 2013 Claimant was involved in a public altercation with Ms. Friedstein. Cell phone video captured the altercation. Claimant is seen approaching Ms. Friedstein from behind, grabbing her by the shoulders and throwing Ms. Friedstein forcibly to the ground. Claimant then sits on top of Ms. Friedstein in a straddling position and proceeds to use her right upper extremity to repeatedly punch her in the head and upper torso area. She also walks freely with both of her lower extremities, has no problems with her left ankle and, on several occasions, is able to plant her lower extremities and rotate her body. Dr. Ring maintained that Claimant's shoulder symptoms either resolved prior to the July 24, 2013 altercation or were aggravated as a

result of the altercation. Dr. Cebrian remarked that, based upon the evidence in the video, Claimant's functional abilities and the medical records the ongoing right shoulder, right hip and left ankle symptoms are not related to the original October 6, 2011 slip and fall. Although the video depicts Claimant engaging in activities that suggest significant functional abilities, the July 24, 2013 incident did not constitute a subsequent intervening event that severed the causal connection from the October 6, 2011 industrial injury. The July 24, 2013 altercation did not cause Claimant's need for medical treatment but merely reflected an increase in her functional abilities. Accordingly, the July 24, 2013 altercation was not an efficient intervening cause that warrants withdrawal of the admission of liability.

27. Claimant has failed to prove that it is more probably true than not that the requested surgical procedures for her shoulder, hip and ankle from the physicians at Western Orthopedics are reasonable, necessary and related to her October 6, 2011 industrial injuries. Dr. Nagamani maintained that Claimant had objective evidence and pathology in the left ankle requiring surgical repair. Dr. Bazaz noted that objective pathology was present in Claimant's shoulder and he suspected adhesive capsulitis. He explained that he could not make a determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. Claimant explained that she was still having problems with her right upper extremity and particularly her right shoulder. She also remarked that her right hip pain has worsened in the last several months and she is still experiencing pain in her left ankle. Claimant requested authorization for the procedures recommended by Drs. Bazaz and Nagamani as well as treatment for her right hip.

28. In contrast, Dr. Ring persuasively maintained that in the July 24, 2013 video Claimant "shows no decreased range of motion involving the hip, ankles or right upper extremity." He emphasized that Claimant's actions in the videos were inconsistent with her medical records and his physical examination. Dr. Ring specifically noted that Dr. Bazaz had requested surgical intervention based on Claimant's right adhesive capsulitis or frozen shoulder. However, because the videos depicted Claimant "repetitively flex[ing], extend[ing] and abduct[ing]" her right shoulder she did not have any right shoulder limitations. He consistently maintained that Claimant's current right shoulder symptoms were not related to her October 6, 2011 industrial injury. Dr. Ring specifically detailed that Claimant underwent right shoulder surgery, her symptoms resolved and she has no ongoing shoulder pathology. Moreover, Dr. Cebrian explained that the recommended procedures from Drs. Bazaz and Nagamani, as well as additional treatment to Claimant's hip was not reasonable, necessary, or related to her October 6, 2011 industrial injuries. Dr. Cebrian testified that Claimant's ongoing pathology in her right shoulder is likely due to adhesive capsultitis. He remarked that, based upon the evidence in the video, Claimant's functional abilities and the medical records, the ongoing pathology in the right shoulder is not related to the original October 6, 2011 slip and fall. Dr. Cebrian also explained that Claimant's right hip pathology is likely related to the natural progression of a degenerative condition not to the original October 6, 2011 event. Dr. Cebrian explained that treatment for the left ankle is not related based on the functional abilities that Claimant demonstrated during the altercation on July 24, 2013 and the surveillance footage from November 4, 2013.

29. Drs. Nagamani and Bazaz provided equivocal accounts regarding the cause of Claimant's current symptoms. After reviewing the videos, Dr. Nagamani could not state within a reasonable degree of medical probability that the objective pathology of Claimant's left ankle was related to the November 17, 2012 event in which Claimant's hip "locked up." Dr. Nagamani also noted that the videos demonstrate that Claimant did not have an altered gait, appeared to walk fluidly and did not demonstrate instability in her left ankle. Dr. Bazaz explained he could not make a determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. He declined to provide an opinion regarding causation of Claimant's right shoulder complaints. Based on the persuasive opinions of Drs. Ring and Cebrian, the video of the July 24, 2013 altercation and the equivocal statements from Drs. Nagamani and Bazaz regarding the cause of Claimant's continuing symptoms, Claimant's request for surgical procedures on her shoulder, hip and ankle is denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Fraud

4. Respondents assert that, because it relied on Claimant's materially false representation in filing its admissions of liability, it is entitled to the retroactive recovery of its payments. An ALJ may permit an insurer to withdraw a general admission of liability and order repayment of benefits paid under the admission if the claimant

supplied materially false information upon which the insurer relied in filing the admission. *Arenas v. Industrial Claim Appeals Office,* 8 P.3d 558 (Colo. App. 2000); *Vargo v. Industrial Commission,* 626 P.2d 1164 (Colo. App. 1981). Because admissions of liability may not ordinarily be withdrawn retroactively, the respondents bear the burden of proof to establish the preceding conditions by a preponderance of the evidence. *See Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001) (admission may not be withdrawn unilaterally).

5. To establish fraud or material misrepresentation a party must prove the following:

> (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; [and] (5) Action based on the representation or concealment resulting in damage.

In Re Arczynski, W.C. No. 4-156-147 (ICAP, Dec. 15, 2005). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *Id.*

6. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant has fraudulently obtained benefits and compensation by willfully misrepresenting her physical condition to her treating physicians in violation of §8-43-402, C.R.S. On October 6, 2011 Claimant slipped and fell on a wet floor on Employer's premises during the course and scope of her employment. Claimant sustained contusions to her right shoulder, right wrist, right elbow and right hip. Respondents admitted liability for the claim and Claimant presented to her authorized treating physicians for conservative treatment of her injuries. On February 23, 2012 Claimant underwent right shoulder surgery but subsequently continued to experience right shoulder symptoms. Claimant's physicians considered whether she was suffering from CRPS but determined through testing that she did not have the condition. Because subsequent conservative measures failed, Claimant's treating doctors ultimately sought authorization for surgery for her shoulder, hip and ankle. Although Respondents have produced evidence through physicians that surgery is not reasonable, necessary and related to Claimant's October 6, 2011 industrial injury, they have failed to demonstrate that Claimant has fraudulently obtained medical benefits. Specifically, Respondents have failed to prove that Claimant falsely misrepresented a material fact to obtain indemnity and medical benefits. Accordingly, Respondents are not entitled to retroactive recovery of benefits paid to Claimant.

Withdrawing the Admission of Liability/Intervening Cause

7. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; In re Swanson, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. Faulkner v. Industrial Claim Appeals Office, 12 P.3d 844, 846 (Colo. App. 2000); Singleton v. Kenya Corp., 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. Faulkner, 12 P.3d at 846.

8. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

9. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2013), C.R.S. Respondents admitted that Claimant sustained industrial injuries on October 6, 2011 while working for Employer. Accordingly, Respondents have the burden of proving by a preponderance of the evidence that Claimant did not sustain injuries to withdraw the admissions.

10. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang,* W.C. No. 4-450-747 (ICAP, May 16, 2005). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez,* W.C. No. 4-499-370 (ICAP, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

11. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Claimant's July 24, 2013 physical altercation with Ms. Friedstein constituted a subsequent intervening event that permits them to withdraw their admission of liability. On July 24, 2013 Claimant was involved in a public altercation with Ms. Friedstein. Cell phone video captured the altercation. Claimant is seen

approaching Ms. Friedstein from behind, grabbing her by the shoulders and throwing Ms. Friedstein forcibly to the ground. Claimant then sits on top of Ms. Friedstein in a straddling position and proceeds to use her right upper extremity to repeatedly punch her in the head and upper torso area. She also walks freely with both of her lower extremities, has no problems with her left ankle and, on several occasions, is able to plant her lower extremities and rotate her body. Dr. Ring maintained that Claimant's shoulder symptoms either resolved prior to the July 24, 2013 altercation or were aggravated as a result of the altercation. Dr. Cebrian remarked that, based upon the evidence in the video, Claimant's functional abilities and the medical records the ongoing right shoulder, right hip and left ankle symptoms are not related to the original October 6, 2011 slip and fall. Although the video depicts Claimant engaging in activities that suggest significant functional abilities, the July 24, 2013 incident did not constitute a subsequent intervening event that severed the causal connection from the October 6, 2011 industrial injury. The July 24, 2013 altercation did not cause Claimant's need for medical treatment but merely reflected an increase in her functional abilities. Accordingly, the July 24, 2013 altercation was not an efficient intervening cause that warrants withdrawal of the admission of liability.

Requested Surgeries

12. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

13. Claimant has failed to prove by a preponderance of the evidence that the requested surgical procedures for her shoulder, hip and ankle from the physicians at Western Orthopedics are reasonable, necessary and related to her October 6, 2011 industrial injuries. Dr. Nagamani maintained that Claimant had objective evidence and pathology in the left ankle requiring surgical repair. Dr. Bazaz noted that objective pathology was present in Claimant's shoulder and he suspected adhesive capsulitis. He explained that he could not make a determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. Claimant explained that she was still having problems with her right upper extremity and particularly her right shoulder. She also remarked that her right hip pain has worsened in the last several months and she is still experiencing pain in her left ankle. Claimant requested authorization for the procedures recommended by Drs. Bazaz and Nagamani as well as treatment for her right hip.

14. In contrast, Dr. Ring persuasively maintained that in the July 24, 2013 video Claimant "shows no decreased range of motion involving the hip, ankles or right

upper extremity." He emphasized that Claimant's actions in the videos were inconsistent with her medical records and his physical examination. Dr. Ring specifically noted that Dr. Bazaz had requested surgical intervention based on Claimant's right adhesive capsulitis or frozen shoulder. However, because the videos depicted Claimant "repetitively flex[ing], extend[ing] and abduct[ing]" her right shoulder she did not have any right shoulder limitations. He consistently maintained that Claimant's current right shoulder symptoms were not related to her October 6, 2011 industrial injury. Dr. Ring specifically detailed that Claimant underwent right shoulder surgery, her symptoms resolved and she has no ongoing shoulder pathology. Moreover, Dr. Cebrian explained that the recommended procedures from Drs. Bazaz and Nagamani, as well as additional treatment to Claimant's hip was not reasonable, necessary, or related to her October 6, 2011 industrial injuries. Dr. Cebrian testified that Claimant's ongoing pathology in her right shoulder is likely due to adhesive capsultitis. He remarked that, based upon the evidence in the video, Claimant's functional abilities and the medical records, the ongoing pathology in the right shoulder is not related to the original October 6, 2011 slip and fall. Dr. Cebrian also explained that Claimant's right hip pathology is likely related to the natural progression of a degenerative condition not to the original October 6, 2011 event. Dr. Cebrian explained that treatment for the left ankle is not related based on the functional abilities that Claimant demonstrated during the altercation on July 24, 2013 and the surveillance footage from November 4, 2013.

15. Drs. Nagamani and Bazaz provided equivocal accounts regarding the cause of Claimant's current symptoms. After reviewing the videos, Dr. Nagamani could not state within a reasonable degree of medical probability that the objective pathology of Claimant's left ankle was related to the November 17, 2012 event in which Claimant's hip "locked up." Dr. Nagamani also noted that the videos demonstrate that Claimant did not have an altered gait, appeared to walk fluidly and did not demonstrate instability in her left ankle. Dr. Bazaz explained he could not make a determination as to Claimant's exact pathology until the shoulder was manipulated through a surgical procedure. He declined to provide an opinion regarding causation of Claimant's right shoulder complaints. Based on the persuasive opinions of Drs. Ring and Cebrian, the video of the July 24, 2013 altercation and the equivocal statements from Drs. Nagamani and Bazaz regarding the cause of Claimant's continuing symptoms, Claimant's request for surgical procedures on her shoulder, hip and ankle is denied.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents' request for retroactive recovery based on fraudulently obtained indemnity and medical benefits paid to Claimant is denied and dismissed.

2. Respondents' request to withdraw their admission of liability and recover an overpayment of TTD benefits because Claimant's July 24, 2013 physical altercation with Ms. Friedstein constituted a subsequent intervening event is denied and dismissed.

3. Claimant's request for surgical procedures on her shoulder, hip and ankle from the physicians at Western Orthopedics is denied and dismissed.

4. Any issues not resolved by this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 7, 2015.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether respondents have proven by clear and convincing evidence that the determination of Division-sponsored Independent Medical Examination ("DIME") physician Dr. Weaver on the issue of permanent partial disability ("PPD").

- Whether claimant has proven by clear and convincing evidence that the determination of DIME physician Dr. Weaver that claimant is at maximum medical improvement ("MMI") is incorrect.

- Whether claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Janssen is reasonable and necessary to cure and relieve claimant from the effects of the work-related injury sustained December 7, 2010?

FINDINGS OF FACT

1. Claimant is employed by the Mesa County Sheriff's Department as a Deputy Sheriff. Claimant sustained an admitted workers' compensation neck injury December 7, 2010 when he reached into his patrol vehicle and attempted to retrieve a weapon that was still locked or stuck in the vehicle's weapons' rack locking apparatus, causing a neck strain and aggravating claimant's pre-existing cervical disc disease.

2. Claimant underwent conservative care until a two level neck surgery was performed January 25, 2012 by Dr. Janssen. Dr. Janssen performed a two level procedure including artificial disc replacement at C5-6 and revision of a prior fusion at C4-5, which was diagnosed by him as a pseudoarthrosis, and was therefore not considered to be a "stable platform" by Dr. Janssen for the adjacent disc replacement procedure at C5-6.

3. Claimant had previously undergone a fusion at C4-5 October 29, 2007 by Dr. Tice. Claimant testified that after he recovered from that procedure he returned to full duty with no impairment. Dr. Tice released Claimant to full duty December 17, 2007. Claimant's testimony in this regard is found to be credible and persuasive and supported by the medical records entered into evidence.

4. Claimant testified that after his initial recovery from the 2012 surgical revision and disc replacement he began to develop left sided symptoms in the latter part of 2012. Claimant testified these symptoms included weakness and pain affecting his left shoulder and left upper extremity.

5. Review of the medical records entered into evidence by the parties demonstrate that Dr. Stagg, Dr. Clifford, Dr. Lewis, and Dr. Janssen document Claimant complaining of left sided neck pain and symptomatology, including shoulder pain, in a similar pattern to the left upper extremity symptoms that re-appeared in late 2012 and continued into 2013 and 2014 for which surgery at C3-4 was proposed by Dr. Janssen.

6. Dr. Janssen testified at hearing in this matter. Dr. Janssen testified that he initially attempted to do the most minimal surgery in 2012 to address a significant neck injury, including the necessary fusion revision at C4-5 and disc replacement at C5-6, but that the initial injury likely also aggravated any pre-existing degenerative disc disease at the C3-4 level, which now requires surgical intervention attributable to the workplace injury. Dr. Janssen's opined that the surgery now proposed at C3-4 was a compensable consequence and natural progression of the admitted neck injury December 7, 2010.

7. On February 16, 2013, Dr. Janssen requested authorization for an artificial disc replacement at C3-4, which was denied by respondents.

8. On February 10, 2014 Dr. Stagg placed Claimant at MMI and provided a 15% whole person impairment after apportioning or deducting 9% attributable to the 2007 surgery. The non-apportioned whole person rating would have been 23%. Dr. Stagg opined the surgery proposed at C3-4 was non-work related but more likely resulted from the 2007 neck injury.

9. Dr. Weaver performed a DIME May 15, 2014. Dr. Weaver opined claimant reached MMI, and opined that the proposed surgery at C3-4 was the result of a pre-existing condition. Dr. Weaver opined that Claimant's current complaints were much the same as the symptoms in 2007 following his prior injury. Dr. Weaver opined claimant was at maximum medical improvement ("MMI") as of Febraury 1, 2013 and provided claimant with a 21% whole person impairment rating.

10. In the May 15, 2014 report, Dr. Weaver diagnosed claimant with a C3-4 disc degeneration with resultant stenosis and nerve root irritation, status post fusion of C4-5 and disc replacement at C5-6, possible SLAP lesion of the left shoulder and gastrointestinal reflux disease ("GERD"). Dr. Weaver opined that apportionment should be considered in this case based on claimant's pre-existing cervical spine disease including two previous operations. Dr. Weaver opined that claimant's surgical stabilization at C4-5 contributed to the progression of disc degeneration at C3-4. Dr. Weaver noted that claimant's current symptoms were the result of the C3-4 disc degeneration. Dr. Weaver opined that of claimant's 21% whole person impairment rating, 60% was related to his pre-existing condition. Therefore, Dr. Weaver opined that a 9% whole person impairment rating was related to the December 7, 2010 injury. Dr. Weaver recommended ongoing medical care based on claimant's continued complaints of pain.

11. However, Dr. Weaver subsequently issued a summary sheet dated June 9, 2014 that indicated that apportionment was not applicable and provided claimant with a 21% whole person impairment rating.

12. Claimant was referred to Dr. Rauzzino by respondents for an independent medical examination ("IME") on or about August 3, 2013. Dr. Rauzzino reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Rauzzino issues a report and opined that Claimant's proposed surgery at C3-4 is the result of the prior 2007 injury and surgery, and not related to the December 7, 2010 injury. Dr. Rauzzino further opined that the surgical revision of the pseudoarthrosis at C4-5 performed by Dr. Janssen was simply coincidental, and not medically necessary due to the 2010 injury causing the need for a second neck surgery.

13. Dr. Stagg testified by deposition in this case. Dr. Stagg opined during his deposition that the apportionment he performed was not incorrect because the prior fusion in 2007 would have constituted permanent impairment, and was therefore "disabling" whether the condition was actually causing any symptoms, or lost time, or medical restrictions immediately prior to the 2010 injury.

14. Dr. Stagg testified he disagreed with Dr. Weaver's initial opinion that claimant PPD rating should be apportioned 60% to a pre-existing condition. Dr. Stagg testified that the Division of Workers' Compensation has indicated that in accessing apportionment, the physician should not use an arbitrary number, which it appeared Dr. Weaver used in his apportionment application.

15. Dr. Weaver testified by deposition in this case. Dr. Weaver noted claimant had a history of pre-existing problems with his neck prior to his December 7, 2010 work injury, including the cervical surgery performed by Dr. Tice. Dr. Weaver testified that he indicated in his report that apportionment would be appropriate because he felt that claimant would not have had the current problems and need for further surgery if he hadn't had the pre-existing cervical disk disease.

16. Dr. Weaver testified that after he issued his report, he was sent an incomplete notice from the Division of Workers' Compensation. Dr. Weaver testified he issued the second DIME summary sheet following the receipt of the incomplete notice. Dr. Weaver testified that he was being forced to comply with the rules of Workers' Comp legislation. Dr. Weaver explained that the rules involving apportionment indicated that the physician should not apportion an injury unless there is a previous documented and rated impairment, but you cannot simply pick a number for apportionment as he did. Dr. Weaver acknowledged during the deposition that this rule applies to injuries after July 1, 2008, such as the injury in this case.

17. Dr. Weaver noted that the 2007 injury involved a surgery that claimant apparently had through his private insurance and did not result in documentation of an actual impairment.

18. The ALJ finds that Dr. Weaver determined he should not apportion the PPD rating based on the DIME summary sheet dated June 9, 2014. The basis of why Dr. Weaver determined he should not apportion the impairment rating is based on his determination after receiving the incomplete notice that apportionment was not applicable under the Colorado Medical Treatment Guidelines applying to apportionment for injuries after July 1, 2008.

19. Nonetheless, the opinion from Dr. Stagg that apportionment is appropriate in this case appears to be a difference of medical opinion between Dr. Stagg and Dr. Weaver. While Dr. Stagg determined that apportionment was appropriate, there is a lack of evidence in this case that Dr. Stagg's apportionment was based on a prior documented impairment. The ALJ therefore determines that respondents have not overcome the opinion of Dr. Weaver by clear and convincing evidence on the issue of the PPD rating provided by Dr. Weaver.

20. With regard to the proposed surgery recommended by Dr. Janssen, Dr. Weave opined that this proposed surgery was not related to the work injury of December 7, 2010. This opinion is supported by the opinion of Dr. Stagg noted in his February 18, 2014 report that it was related to the 2007 injury and not to the December 7, 2010 injury.

21. The ALJ notes that the relatedness of the proposed surgery is intertwined into the decision by Dr. Weaver that claimant is at MMI. Therefore, claimant is held to overcoming the opinion of Dr. Weaver regarding MMI by clear and convincing evidence. Based on the evidence presented at hearing, the ALJ cannot conclude that claimant has overcome this increased burden.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2011. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider,

among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, respondents have failed to overcome the DIME physician regarding his opinion on claimant's PPD rating by clear and convincing evidence.

6. As found, claimant has failed to overcome the DIME physician regarding his opinion on MMI.

7. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Even though an admission of liability is filed, the claimant bears the burden of proof to establish the right to specific medical treatment. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990).

8. As found, claimant has failed to establish that the proposed medical treatment recommended by Dr. Janssen is reasonable and necessary to cure and relieve claimant from the effects of his work injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant PPD benefits based on the 21% whole person impairment rating provided by Dr. Weaver.

2. Claimant's attempt to overcome the DIME physician on the issue of MMI is denied.

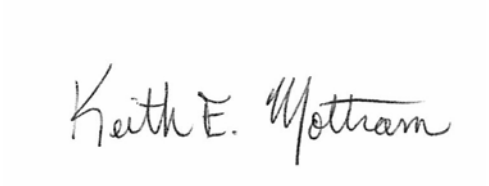
3. Claimant's request for authorization of the cervical surgery recommended by Dr. Janssen is denied.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 7, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUES

1. Whether the claimant's Application for Hearing and Notice to Set should be stricken as having been untimely filed.

2. If not, whether an Interlocutory Order should issue in which the Administrative Law Judge notes that the treating physicians as well as the DIME physician have considered the role of the claimant's chemical sensitivity in formulating treatment protocols for the claimant's admitted back injury.

For the reasons stated below the claimant's Application for Hearing and Notice to Set is stricken, and , therefore, the ALJ does not reach a decision on the second issue.

FINDINGS OF FACT

1. The instant hearing was set pursuant to the claimant's June 25, 2014 Application for Hearing and Notice to Set concerning the endorsed issues of permanent partial disability benefits and "claimant is going to cancel the Division Independent Medical Examination request related to the Final Admission of Liability filed on May 16, 2014. It was claimant's intent that the parties would enter into a stipulation regarding consolidating both claims and allowing claimant to undergo one Division IME once she had recovered from her knee surgery which took place on June 17, 2014. Claimant further seeks to overcome the DIME opinions of Dr. Hua Chen in connection with the impairment rating and MMI for her back as well as claimant's entitlement to medical benefits and impairment for her chemical sensitivity if any, which was not addressed by Dr. Chen."

2. The respondent filed a timely response to Application for Hearing on July 16, 2014 endorsing the additional issue of "C.R.S. 8-43-201(2)(b)(II) for the claimant's failure to timely file an Application for Hearing following respondent's May 16, 2014 Final Admission of Liability.

3. At the commencement of the hearing, the claimant's counsel withdrew the issues of overcoming the DIME as to maximum medical improvement and permanent impairment and indicated that the only issue is the "consideration" of the claimant's pre-

existing chemical sensitivity for further treatment of the underlying February 16, 2012 low back claim.

4. The respondent had previously filed a Motion for Summary Judgment which was denied. The respondent reiterated its objection to proceeding on the merits of the issues presented based upon the claimant's late Application for Hearing, which jurisdictionally barred the claimant from proceeding on the issues endorsed in her June 25, 2014 Application for Hearing and Notice to Set.

5. The ALJ finds that the issues of permanent partial disability benefits, overcoming the DIME as to MMI and permanent impairment, and the "claimant's entitlement to medical benefits and impairment for her chemical sensitivity" were closed by the Final Admission of Liability dated May 16, 2014, when the claimant failed to apply for a hearing on these issues within 30 days.

CONCLUSIONS OF LAW

1. C.R.S. 8-43-203(2)(b)(II) provides that a Final Admission must contain a statement that the claim will automatically be closed as to the issues admitted, "if the claimant does not, within 30 days after the date of the Final Admission, contest the Final Admission in writing and request a hearing on any disputed issues that are ripe for hearing." The courts have previously treated provisions for objecting to and contesting a Final Admission as jurisdictional. *Roddam v. Rocky Mountain Recycling*, WC No. 4-367-003 (January 24, 2005). *Pete Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004). If the claimant fails to file her Application, the issues admitted in the Final Admission are closed.

2. It is undisputed in this case that the claimant's Application for Hearing was not filed within 30 days of the date of the May 16, 2014 Final Admission of Liability. In fact, the claimant's Application for Hearing filed on June 25, 2014 was filed 40 days after the date of the filing of the Final Admission of Liability.

3. Claimant's endorsed issues of permanent partial disability benefits, overcoming the DIME as to maximum medical improvement and impairment, and "medical benefits and impairment for her chemical sensitivity" were issues in dispute at the time of the filing of the respondent's May 16, 2014 Final Admission of Liability and accordingly struck.

ORDER

It is therefore ordered that:

1. The claimant's Application for Hearing and Notice to Set, dated June 25, 2014 is hereby stricken and the issues stated therein are denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 8, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether respondents have overcome the findings of the Division-sponsored Independent Medical Exam ("DIME") physician by clear and convincing evidence on the issue of permanent partial disability ("PPD") benefts?

- Whether claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits for the period of November 23, 2013 through the date of maximum medical improvement ("MMI")?

- Whether respondents have proven by a preponderance of the evidence that Claimant committed a volitional act that resulted in termination of her employment?

- Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to a general award of post-MMI medical benefits?

- Whether Claimant has proven by a preponderance of the evidence that Dr. Price is authorized to provide medical treatment for her industrial injury?

- Whether claimant has proven by a preponderance of the evidence that her average weekly wage ("AWW") should be increased based on the cost of continuing her coverage under Employer's group health insurance plan effective March 1, 2013, and if so, to what extent it should be increased?

- Whether respondents have proven by a preponderance of the evidence that they are entitled to an offset against TTD and PPD benefits owed to claimant for compensation provided to claimant in the Separation Agreement and Waiver ("the Agreement")?

FINDINGS OF FACT

1. Claimant sustained a compensable injury on February 7, 2012 when she tripped and fell in a parking lot. The claim was initially denied by respondents but was found compensable following a hearing. During the same hearing, claimant's claim for compensation resulting from an occupational disease resulting in carpal tunnel syndrome was denied by the court. At that hearing, the parties had stipulated to an AWW of $651.30.

2. Claimant initially sought medical treatment following the injury with her personal physicians at Western Medical Associates on February 9, 2012 and was

evaluated by Ms. Saunders, a nurse practitioner. Claimant provided a consistent accident history and reported that she was sore in her neck, right shoulder and knees. Claimant was provided with prescription medications. Claimant returned to Western Medical Associates on February 15, 2012 and complained of continuing pain in her right shoulder. Claimant was diagnosed with degenerative problems involving the lumbar and thoracic spine and a shoulder sprain.

1. Claimant was evaluated by Dr. Lewis on March 1, 2012 following a referral from Ms. Saunders. Claimant reported a history of low back pain with radiation into her right lower extremity. Claimant reported she had a history of low back pain following an incident after a cholecsystectomy in 2006 when she fell and struck her right hip sustaining a substantial contusion and hematoma formation. Claimant also reported that three weeks ago she fell forward when tripping in a parking lot and related that this fall exacerbated her pain. Claimant complained of pain in her right shoulder, cervicalgia and occipital head pain following her fall. Dr. Lewis noted Claimant had undergone a magnetic resonance image ("MRI") of the lumbar spine in 2006 and again in October 2011. Dr. Lewis recommended an epidural steroid injection ("ESI") which was accomplished on March 5, 2012.

2. Dr. Lewis spoke to Claimant over the phone on March 8, 2012 and noted Claimant experienced an acute exacerbation of pain following her ESI. Claimant reported feeling much better as of March 8, 2012. Claimant returned to Dr. Lewis on March 13, 2012 and reported some limited improvement in her low back following the ESI, she also reported worsening in her neck and upper extremity symptoms. Dr. Lewis noted that he suspected Claimant to have either a cervical radiculopathy or myelopathy and recommended an MRI of her cervical spine, which was accomplished on March 13, 2012. The MRI showed a small right C6-7 disk herniation laterally in the C7 foramen. Dr. Lewis opined that the herniated disk was likely contributing to claimant's right upper extremity symptoms and recommended neurosurgical consultation.

3. Claimant was referred by employer to Dr. Stagg after claimant requested medical treatment in March 2012. Claimant subsequently was allowed to change her choice of physician to Dr. McLaughlin. Dr. McLaughlin initially evaluated claimant on April 25, 2012. Dr. McLaughlin noted that there was no clear etiology as to why claimant fell and recommended that claimant follow up with Ms. Saunders at Western Medical Associates. At the prior hearing in this case, it was determined that Dr. McLaughlin had refused to provide treatment for claimant for non-medical reasons and the claimant was allowed to continue to treat with Ms. Saunders as an authorized provider based on Dr. McLaughlin's refusal to treat.

4. Claimant continued to follow up with Ms. Saunders and also continued to treat with Dr. Lewis who provided claimant with injections into her low back. Dr. Lewis noted on June 5, 2012 that claimant had a specific right upper extremity problem that seemed to fit well with the C7 nerve distribution. Dr. Lewis noted that claimant's MRI of her cervical spine demonstrated a right sided disc prolapsed into the exiting

neuroforamen at the C7 level, but fortunately there was no electrical evidence of a significant permanent neurologic injury. Dr. Lewis referred claimant to Dr. Tice.

5. Dr. Tice initially evaluated claimant on June 13, 2012. Dr. Tice noted claimant had a right C6-7 disk herniation, but noted Claimant's symptoms would not be completely explained by the herniation. Dr. Tice recommended an electromyelogram ("EMG") to determine if her symptoms were caused by her cervical spine or carpal tunnel. Dr. Tice continued to treat claimant for her low back and shoulder pain.

6. Claimant underwent a C6-7 cervical epidural steroid injection ("ESI") on June 22, 2012 under the auspices of Dr. Lewis. Dr. Lewis performed a repeat ESI on July 24, 2012. Claimant returned to Dr. Lewis on August 16, 2012 and reported some improvement (about 60%) in her right upper extremity symptoms following the two ESI's. Dr. Lewis noted claimant was requesting a referral for physical therapy, which was provided by Dr. Lewis.

7. Claimant returned to see Dr. Tice on November 26, 2013. Dr. Tice discussed the fact that Claimant had been through litigation and her fall in the parking lot was deemed to be work-related, but the carpal tunnel condition was not. Dr. Tice further noted that claimant was reporting that when she fell, she struck her hands in the parking lot and had significant pain in her neck and her arms. Dr. Tice noted that his opinion was unchanged and that claimant had a work injury when she fell in the parking lot on her outstretched hands. Dr. Tice opined that claimant had a carpal tunnel syndrome and cervical and lumbar myofascial symptoms as a result of the fall. Dr. Tice noted he could not "precisely assess her clinically" after an inconsistent physical exam. Dr. Tice noted Claimant was quite disturbed as a result of her recent litigation and job loss. Dr. Tice recommended that claimant be evaluated for possible psychological manifestations as a result of her injury and referred claimant for physical therapy. Dr. Tice took claimant off of work completely as a result of his exam on November 26, 2013.

8. Claimant testified at hearing that at the time she saw Dr. Tice, she had pain in many parts of her body and was a wreck emotionally.

9. Claimant testified that she requested Dr. Tice to refer her to Dr. Price for pain management treatment. Claimant testified that she was aware that Dr. Price did acupuncture and laser treatments she wanted to try alternatives to narcotics for her pain management.

10. On December 30, 2013, Claimant returned to see Dr. Winnefeld at Western Medical Associates. Claimant had previously been referred to Dr. Winnefeld for treatment of her carpal tunnel syndrome before that claim was found to be not compensable. Dr. Winnefeld noted that Claimant was complaining of left shoulder, neck, low back, and bilateral leg pain. Dr. Winnefeld noted that the prior order concluded that her fall and subsequent pain from the fall was compensable under the

Colorado Workers' Compensation Act. Dr. Winnefeld noted that it was his understanding that the decision determined that the fall did not cause claimant's carpal tunnel syndrome. Therefore, Dr. Winnefeld limited his exam to the workers' compensation injury, and not for carpal tunnel syndrome.

11. Dr. Winnefeld further noted that it was still his opinion claimant's carpal tunnel syndrome was work-related and that claimant was not at MMI. Dr. Winnefeld noted that clamant was complaining of neck pain, shoulder pain, and thigh pain and reported she had a herniated disc in her neck. Dr. Winnefeld noted that his interpretation of the MRI performed in March 2012 did not show a herniated disc. Dr. Winnefeld opined that Claimant was at MMI for the February 7, 2012 work injury and referred claimant to Dr. Price for an impairment rating.

12. Dr. Winnefeld noted that claimant should be restricted from working due to her severe emotional issues and pain symptoms. Dr. Winnefeld noted that the was little if any objective evidence of the pain symptoms, but nonetheless provided claimant with restrictions based, at least in part, on her pain symptoms.

13. Claimant testified that she asked Dr. Winnefeld to refer her to Dr. Price because she already had a visit scheduled with Dr. Price, on referral from Dr. Tice. Claimant testified that at that point in time, she did not know what was involved with a permanent impairment rating.

14. Claimant returned to Dr. Tice on January 14, 2014. Dr. Tice noted that claimant had an appointment with Dr. Price for a disability rating. Dr. Tice noted that claimant had minor symptoms regarding the cervical and lumbar spine which were related to her work injury. Dr. Tice further noted claimant's ongoing complaints with regard to her carpal tunnel and ulnar neuropathy. Dr. Tice sent a copy of his report to Dr. Price.

15. Dr. Price initially evaluated claimant on January 15, 2014. Dr. Price noted claimant's accident history of falling on pavement on February 7, 2012. Claimant reported pain complaints to Dr. Price involving her neck, low back and shoulder. Dr. Price recommended claimant begin Cymbalta and referred claimant to Dr. Cohen for her psychiatric condition. Dr. Price performed acupuncture and referred claimant for physical therapy. Dr. Price opined that claimant should be off of work for at least a month until she can see her again and return her slowly back to sedentary or light duty.

16. Claimant returned to see Dr. Lewis on January 27, 2014. Dr. Lewis performed a left-sided epidural steroid injection at the C6-C7 level and noted Claimant needed to return in two weeks for reevaluation.

17. Dr. Price later noted on January 29, 2014 that claimant was referred to her by Dr. Tice for consultation for pain management and initially I was meant to see her under her general medical care. Dr. Price noted that she was informed by the attorney

for respondents that the referral was for an impairment rating only. Dr. Price further noted that she had been provided with Dr. Winnefeld's December 30, 2013 medical report placing claimant at MMI. Dr. Price noted that she had not yet determined if claimant was at MMI, nonetheless, Dr. Price performed an impairment rating.

18. Dr. Price ultimately provided an impairment rating of 28% whole person. The 28% whole person rating was comprised of 14% cervical spine impairment, 13% lumbar spine impairment, and 4% whole person impairment to the shoulder.

19. The ALJ credits the report of Dr. Price along with the testimony of claimant and finds that claimant was referred to Dr. Price by Dr. Tice for treatment of her work related injury. The ALJ therefore determines that claimant has established that it is more likely than not that Dr. Price is authorized to provide treatment related to her work injury.

20. Claimant returned to see Dr. Lewis on February 6, 2014. Dr. Lewis noted claimant had improvement following the injection and had been doing physical therapy. Dr. Lewis noted that if claimant's symptoms did not improve with cervical epidural steroid injections, an additional MRI may be needed since her last MRI took place on March 13, 2012.

21. Following Dr. Price's impairment rating, Respondents requested a DIME, and Dr. James Regan was selected as the DIME physician. Dr. Regan was scheduled to meet with Claimant on May 2, 2014. However, it appears from the records that the date of the appointment was subsequently changed to June 6, 2014. In any event, Dr. Regan reviewed claimant's medical records and the prior order from the ALJ in connection with his DIME, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Regan ultimately opined that claimant was at MMI as of June 6, 2014, and provided a 30% whole person impairment rating. The 30% whole person impairment rating consisted of a 15% cervical spine impairment, 12% lumbar spine impairment, and 6% whole person impairment for Claimant's psychological condition related to her depression.

22. With regard to the psychological impairment, Dr. Regan completed the Division of Workers' Compensation Mental Impairment Rating Report Work Sheet and provided claimant with a DSM diagnosis of depression. Dr. Regan provided scores for various areas of function, including activities of daily living; social functioning; thinking, concentration, and judgment; and adaptation to stress. Dr. Regan averaged the two highest area of function ratings to a total of 2, applied the number 2 to the category conversion table, and arrived at the final rating of 6% whole person for Claimant's depression.

23. Respondents filed a timely application for hearing to overcome Dr. Regan's DIME opinion. The ALJ notes that the issue of MMI, including the date of MMI, was not raised by either party before the ALJ. Therefore, as discussed at the

commencement of the hearing, the ALJ lacks jurisdiction to make any ruling involving the finding of MMI by Dr. Regan.

24. Dr. Bernton testified at hearing on behalf of Respondents consistent with his various independent medical examination ("IME") reports. Dr. Bernton performed two IME's in this case. The first on June 26, 2013, before the prior hearing and on March 26, 2014, after Dr. Price's impairment rating. Dr. Bernton testified that claimant's fall in the parking lot did not lead to disability or impairment. Dr. Bernton opined that Dr. Regan's physical impairment rating did not properly follow the directives of the AMA Guides, 3rd Edition, (Revised) because the impairment rating did not properly consider the guides instructions regarding causation. Dr. Bernton opined that the discussion regarding impairment must include a discussion of the pathophysiology of the particular condition and of the pertinent host characteristics. Dr. Bernton noted that the existence of an impairment does not create a presumption of the contribution by a factor with which the impairment is often associated. Dr. Bernton testified that Dr. Regan's rating of 25% for the neck and the back was flawed due to a failure to reach an assessment of a reasonable pathophysiology that could have occurred from the February 7, 2012 fall, and a failure to establish that the force and magnitude of any injury that may have occurred on February 7, 2012 was sufficient to create the impairment measured by Dr. Regan more than two years later. According to Dr. Bernton, the rating provided by Dr. Regan was not consistent with the history, and not compliant with the causation principles of the AMA Guides.

25. Dr. Bernton testified that he agreed with Dr. Kleinman that Dr. Regan was wrong in asserting that claimant had no pre-existing depression. Dr. Bernton testified that there was no evidence of the type of methodology required to assess mental impairment, and, in this case, there was no evidence of treatment of the condition rated by the authorized physicians in this case. Dr. Bernton also noted that he had performed psychological testing on June 28, 2013 that showed a 98% job dissatisfaction. Dr. Bernton testified that the claimant's job dissatisfaction was not insignificant in the course of this claim. Dr. Bernton testified that he wouldn't expect a trip and fall injury to result in the type of impairment described in Dr. Regan's DIME report because Dr. Bernton felt that claimant had only sustained a minor injury on February 7, 2012.

26. The ALJ finds the testimony of Dr. Bernton to be unpersuasive in determining the issue of PPD. The ALJ notes that the opinion of Dr. Bernton represents a difference of medical opinion as to whether the permanent impairment measured by Dr. Regan was related to the February 7, 2012 fall. Dr. Bernton opined that it was not based on the findings of inconsistencies by the medical providers and his opinion that claimant's fall represented only a minor injury. The ALJ finds that these opinions do not serve to overcome the contrary opinions of Dr. Regan by clear and convincing evidence.

27. With regard to claimant's treatment for psychiatric issues, claimant testified that employer offered its employees six free visits with a counselor as an employment benefit. Claimant testified that she began seeing a therapist, Ms. Starbird, in June 2012 after her work injury because she felt the attitude of managers had become more negative towards her and she was in significant pain at work and would often cry during working hours. The therapy records indicate that claimant complained of being was overwhelmed, stressed, hurt, and frustrated following her injury.

28. Claimant continued to treat with the therapist through the summer of 2012 and noted Claimant had FMLA, but had used all of her sick time and all of her vacation time. The records also document claimant's ongoing personal issues involving her family and issues with work not related to her work injury. The records also document claimant complaining to the therapist that her anxiety was higher because of increased pain.

29. Claimant testified that Ms. Starbird referred her to Dr. Bishop a clinical psychologist who saw her initially on September 25, 2012. Dr. Bishop noted in his description of her presenting problem that claimant sustained an accident at work while on a smoking break when she tripped and fell in the parking lot, and suffered injuries to her wrists, a disc in her neck, and her knees. Claimant reported to Dr. Bishop that since the injury she states that she has been treated differently at work.

30. Claimant continued to see Dr. Bishop through the end of 2012 and into 2013. In a letter dated May 15, 2013, Dr. Bishop wrote that Claimant had reported to him that her long career with employer had been "rather suddenly interrupted by an injury she suffered at work." Dr. Bishop noted that the unsupportive relationship with her immediate supervisor and other senior employees was more instrumental in the development and maintenance of Claimant's clinical depression. Dr. Bishop noted that Claimant reported she was frustrated with her inability to be as productive as she had for many years due to her injuries. Dr. Bishop noted that her stress and frustration was increased by the lack of "institutional and emotional support" she received for her injuries.

31. As noted above, Dr. Price had referred claimant to Dr. Cohen on January 15, 2014. The referral was initially denied by respondents. Dr. Price noted in her report that claimant's stress level and anxiety needed treatment and was impairing her recovery.

32. Following the DIME evaluation with Dr. Regan, claimant was evaluated by Dr. Cohen on June 11, 2014. Dr. Cohen noted that claimant had sustained injuries in her fall with employer and had sought treatment for her non-work related carpal tunnel syndrome through Medicaid. Dr. Cohen noted that claimant had been referred to his office for behavioral education around helping her deal with residual pain. Dr. Cohen noted claimant's ongoing issues involving her financial situation, her prior marriage and

her work injury. Dr. Cohen recommended claimant continue with 6-8 focused psychotherapy visits related to the aspects of her workers' compensation claim.

33. The ALJ finds the opinions of Dr. Cohen to be credible and persuasive.

34. Claimant returned to Dr. Bishop on June 2, 2014. Claimant reported some improvement in her mood which she attributed to Cymbalta. Dr. Bishop re-evaluated claimant on June 24, 2014 and noted she was feeling an increased amount of depression and that the insurer was fighting her impairment rating from the DIME physician. Dr. Bishop recommended claimant further develop and improve her skills at mindfulness and relaxation and work on her procrastination. Claimant again returned to Dr. Bishop on July 8, 2014. Dr. Bishop noted that he and Claimant had processed her interactions with physicians around her disability, and her desire to recover from her injuries. Dr. Bishop noted Claimant was struggling with the idea that she was disabled and that she wanted to go back to work.

35. Dr. Kleinman performed a psychiatric IME on July 11, 2014. Dr. Kleinman issued a report in connection with his IME evaluation and documented claimant's work history and psychological issues with her work. Claimant reported to Dr. Kleinman that she believed her supervisor's opinion of her changed after her work injury. Claimant also noted that around this same time there were errors on a "storm" report that claimant felt she was being blamed for, while claimant felt the errors were attributable to her supervisor.

36. Dr. Kleinman reviewed claimant's medical records and noted that the mental health notes from 2012 and 2013 indicated that claimant's stress was related to family problems, employment problems, litigation issues and personal problems. Dr. Kleinman opined that there was very little mention in the records of psychological issues and stress related to claimant's pain from the trip and fall. Dr. Kleinman noted that claimant was very concerned with how she was treated at work, but Dr. Kleinman opined that claimant's work stress would be present in all fields of employment as it related to reprimands and termination. Dr. Kleinman diagnosed claimant with a major depressive episode that was recurrent. Dr. Kleinman opined that the depression was related to other issues and not related to the trip and fall at work.

37. On July 11, 2014, Dr. Cohen noted that Claimant had undergone the independent medical examination with Dr. Kleinman, but that she should not review Dr. Kleinman's reports and allow her attorney to handle those issues. Dr. Cohen noted that the larger issues revolved around the fact that she has some chronic physical issues which were long standing in nature that claimant will have to accept and learn to live with.

38. Dr. Robert Kleinman testified at hearing on behalf of Respondents consistent with his report dated July 14, 2014. Dr. Kleinman testified that Dr. Regan's psychological impairment rating was invalid because Dr. Regan did not perform a

psychiatric evaluation or diagnosis, and did not follow the correct steps to provide an impairment rating under the Division of Workers' Compensation rules. Dr. Kleinman testified that Dr. Regan provided an impairment rating without discussing how he came to that rating. Dr. Kleinman testified that Dr. Regan only provided a one sentence history of claimant's psychiatric condition. Dr. Kleinman noted that Dr. Regan provided claimant with a diagnosis of depression, but testified that Dr. Regan didn't analyze the diagnosis. Dr. Kleinman further took issue with the fact that claimant had a prior history of major depression. Dr. Kleinman noted that Dr. Regan's finding that claimant was not depressed prior to the fall was factually wrong. Dr. Kleinman relied on records from Ms. Saunders in March 2010 that indicated that claimant was on Prozac as of that date and the records failed to show that the Prozac was discontinued.

39. The ALJ rejects the testimony of Dr. Kleinman at hearing as unpersuasive. Dr. Kleinman relied on records from Dr. Bishop and noted that claimant was not treated for psychiatric issues related to the workers' compensation claim following her injury. However, this finding ignores the fact that there was significant confusion regarding the compensability of claimant's work injury after it occurred and resulted in Dr. McLaughlin refusing to treat claimant for her work injury until after a finding of compensability was obtained by claimant. Even after her claim was found to be compensable, insurer denied the initial referral to Dr. Cohen provided by Dr. Price.

40. The ALJ further finds that claimant made references to her psychiatric problems as being related to her pain from her work injury to Dr. Bishop and Ms. Starbird. While claimant also had other psychological issues during this same period of time, the ALJ cannot state that the opinions, as expressed by Dr. Kleinman, and the basis for his opinions, overcome the contrary opinions expressed by Dr. Regan that claimant had a ratable psychological disorder related to her work injury by clear and convincing evidence.

41. Claimant testified that Dr. Regan provided an impairment rating for her depression because her pain following the work injury prevented her from working and enjoying activities. Claimant testified that she was not depressed prior to the fall, although there were some periods of time where she had mental health problems. Claimant testified that previously she could always work and provide for herself and her family, and after this injury she has been unable to do that. Claimant testified that she had some periods of depression when she was divorced 29 years prior and when her mother died 10 years prior. Claimant testified that those periods of time were not as bad as the periods of time after this injury, because she was unable to handle challenges in her life. Claimant testified that after her injury and termination, she had difficulty communicating and being intimate with her husband, and had difficulty engaging in activities she used to enjoy like swimming and playing with her grandchildren. Claimant testified she was prescribed Prozac in 2010, but did not continue the prescription until after her work injury. The ALJ credits the testimony of claimant and finds it to be credible and persuasive.

42. Claimant testified that she was asked to submit her resignation on February 27, 2013. She testified that her supervisor told her she was being terminated because of her performance. Claimant testified that she had recently received a performance evaluation giving her a low score. Claimant testified that she had received the review a few weeks before she was terminated. Claimant testified that she was not threatened by the fact that she had received a low score because employer previously would offer training to help improve weaknesses in job performance. Claimant testified that she responded to the low score on the performance review with a three-page email response to her supervisor clarifying why she did things the way she did. Claimant testified that some of the policies for employer had changed, and she was asked to do work tasks in a different way than she had done them previously.

43. Claimant testified that prior to her termination, she had undergone some training to improve her work, especially in the areas of coordination of benefits and eligibility. She testified that these were small-group trainings with her supervisor Ms. McKinney and later with Ms. Marden. Claimant testified that she was not worried that she had to do training, because ongoing training was standard in her work with employer. Claimant testified that she had received a $300 merit bonus for her work for employer in 2012. Claimant testified that not all employees receive merit bonuses.

44. Claimant testified that prior to her termination, she was never warned that she needed to perform a specific act or she would be terminated. Claimant testified that she was not aware of any employer rules or regulations that she violated that caused her to be terminated. Claimant testified that there was never a discussion of her termination prior to the day she was terminated. Claimant testified that she was surprised when she heard the reasons given to her for her termination because she had been working with employer for more than twelve years and knew her job inside and out.

45. Ms. McKinney, the supervisor of the claims department for employer, testified at hearing. Ms. McKinney testified that she may have started supervising Claimant in 2011, but was unsure of when exactly she started as claimant's supervisor. Ms. McKinney testified that claimant had a lot of errors in her work. Ms. McKinney testified that there were some changes in the system and that the examiners were looking at more difficult claims. Ms. McKinney testified that in February 2013 she was asked for feedback regarding claimant's performance and reported that she was not seeing improvement in claimant's performance. Ms. McKinney admitted on cross-examination that some of the claimant's mistakes were due to the programming change that happen each year. Ms. McKinney testified that she was not present for the meeting involving claimant's termination. Ms. McKinney testified that she was not aware of whether claimant received a merit bonus, but that the bonuses are given out based on merit and not to every employee.

46. Ms. Burke, the director of human resources for employer, testified at hearing. Ms. Burke testified that she was involved in the decision to terminate claimant.

Ms. Burke testified that claimant was testified for poor performance. Ms. Burke testified that claimant was retrained and did not improve her performance. Ms. Burke did not identify an incident or a violation of employer's policies that led to claimant's termination.

47. The ALJ concludes that claimant was terminated as a result of poor job performance. However, respondents have not proven that claimant was terminated as a result of a volitional act. The ALJ cannot state based on the testimony of Ms. Burke and Ms. McKinney that claimant committed a volitional act that resulted in her termination of employment. Claimant appears, based on the testimony of Ms. Burke and Ms. McKinney, to have been terminated based on an inability to adequately perform the functions of her job, and not based on a volitional act.

48. Claimant testified that after her termination she was offered a severance package, but that she did not accept it until approximately a year later. Claimant signed the Agreement on February 27, 2014. The Agreement provides that claimant would be paid a lump sum of $8,060 as a severance payment in exchange for claimant waiving any and all claims under the ADEA and release employer from liability under several employment laws. The Agreement states: "Notwithstanding any other provision in this Agreement, this Agreement shall not be construed to limit or modify [claimant's] Workers' Compensation rights for the claims designated as W.C. No. 4-914-529 and 4-890-670." The Agreement makes no reference to the basis for claimant's termination, but notes in paragraph one that claimant voluntarily resigns and separates from employment with employer effective February 27, 2013 which is thereafter referred to as her "Termination Date".

49. Claimant testified that she signed the Agreement because she did not think that employer would ever hire her back, and because she thought that her workers' compensation claim was nearly completed.

50. Claimant testified that she continues to receive medical treatment, including treatment from Dr. Price and physical therapists, to treat the ongoing symptoms from her February 7, 2012 injury. Claimant testified that the treatment she receives improves her symptoms. Claimant testified she hopes to continue receiving treatment so that she can improve her symptoms and return to work.

51. The ALJ finds that Dr. Regan's DIME report provides an impairment rating for claimant's specific disorder diagnoses and loss of range of motion in her cervical and lumbar spine to her work injury. The ALJ finds that the range of motion testing and the Table 53 diagnoses during the DIME were similar and consistent with the determinations of Dr. Price in her permanent impairment rating. Although Dr. Bernton opined that no permanent impairment rating is warranted for Claimant's lumbar or cervical spine, The ALJ cannot state that it was clearly erroneous for Dr. Regan to include specific disorder diagnoses under Table 53 or the range of motion testing results in his final impairment rating.

52. Dr. Regan's report also indicates that he relates claimant's depression and its effect on her activities of daily living, socialization, cognition, judgment, and adaptation to stress to her February 7, 2012 work injury. The ALJ notes that Dr. Kleinman opined that no permanent impairment is warranted for claimant's depression because Claimant's depression is not related to the work injury. Dr. Kleinman also opined that Dr. Regan did not perform a proper psychological evaluation. The ALJ finds this testimony not persuasive. The ALJ credits the testimony of claimant at hearing along with the medical reports and opinions from Ms. Starbird, Dr. Bishop, Dr. Cohen, Dr. Price, and finds that it was not clearly erroneous for Dr. Regan to include a psychological rating for depression in his impairment rating.

53. Respondents argue that the psychiatric rating should not be included because the rating relates to litigation stress. The ALJ is not persuaded. The ALJ notes that claimant initially sought counseling outside of the workers' compensation system in June 2012 after her work injury and reported that she was having issues related to, among other issues, the fact that she was in pain while at work and would often cry during work hours. The ALJ notes that claimant's attempts to receive treatment for her psychiatric condition was frustrated by respondents' denial of the claim and denial of her referrals for psychiatric treatment. The fact that these denials may have caused issues for claimant which she discussed with her treating physicians does not make her entire psychiatric claim not compensable under a theory that it is related to litigation stress. Instead, the ALJ finds that claimant's psychiatric issues, as noted by Ms. Starbird in her initial evaluation, are related to claimant experiencing significant pain as a result of her work injury.

54. The ALJ credits the testimony of claimant and the medical records in evidence, including the records of Dr. Tice, Dr. Price, Dr. Cohen and Dr. Regan and determines that Claimant has proven it is more likely than not that she is entitled to a general award of post-MMI medical benefits arising out of the admitted February 7, 2012 injury.

55. The ALJ notes that Ms. McKinney and Ms. Burke both testified that Claimant was terminated as the result of poor performance, and notes that neither could identify a distinct incident that resulted in Claimant's termination. The ALJ finds that Respondents failed to prove by a preponderance of the evidence that Claimant performed a volitional act that resulted in termination of her employment.

56. The ALJ credits Claimant's testimony and the medical records from Dr. Price and determines that Dr. Price is an authorized treating provider who is within the chain of authorized referrals by virtue of her referral from Dr. Tice.

57. The ALJ notes that Dr. Tice provided a no-work restriction for Claimant on November 26, 2013. The ALJ also notes that Dr. Winnefeld and Dr. Price provided work restrictions for claimant on December 30, 2013 and January 15, 2014, respectively, taking claimant off of work completely. The ALJ finds that claimant has

proven it is more likely than not that her injury resulted in a disability lasting more than three work shifts, and resulting in the no-work restrictions from Dr. Tice, Dr. Winnefeld, and Dr. Price. The ALJ therefore finds that claimant is entitled to temporary total disability benefits beginning November 26, 2013 and continuing until June 6, 2014 when claimant was placed at MMI by the DIME physician. The ALJ notes that the MMI date4 was not raised as an issue by the parties and was not subject to litigation.

58. The ALJ credits the testimony of Ms. McKinney and Ms. Burke and notes that claimant was terminated from her employment. The ALJ notes that while the Agreement in this case makes representations regarding a voluntary resignation, the testimony presented at hearing establish that there was no voluntary resignation in this case. The ALJ further finds that the $8,060 provided to claimant in the Agreement was to settle any potential employment lawsuits and will not have any effect on claimant's rights to workers' compensation benefits, including her right to TTD benefits.

59. Respondents contend that Claimant was paid wages in the form of a lump sum payment after claimant signed the Separation Agreement and Waiver. Respondents contend that they are entitled to an offset for the amount of the lump sum payment pursuant to the Separation Agreement against temporary disability benefits. The ALJ is not persuaded.

60. The ALJ credits Claimant's testimony that the $8,060.00 was paid pursuant to the negotiated agreement for Claimant for not filing or pursuing certain legal actions outside of her workers' compensation claims. This is also reflected in the plain language of the Agreement. The ALJ finds that the amount paid was not wages and should not, in any way, effect claimant's right to workers' compensation benefits.

61. Claimant testified that the group health plan provided by Employer covered herself and her entire family during her employment. The cost of continuing the coverage she received during her employment is $1,462.44 per month, which would have covered her family. Claimant testified she received the COBRA notice in March 2013. Claimant testified that she elected to continue health coverage for only herself for one month following her termination, but could not afford to pay for any additional continuation coverage. The cost for the continuing health care that claimant purchased for one month was $585.04.

62. The parties agree that the claimant's AWW should be increased in the present case based on claimant's entitlement to COBRA. Respondents argue that claimant's COBRA increase is limited to the single coverage claimant elected and maintained for one month. Respondents argument is without merit.

63. The Colorado Supreme Court held in *Ray v. Industrial Claim Appeals Panel*, 145 P.3d 661 (Colo. 2006) that the cost of continuing the injured workers' health insurance should be included in calculating the AWW of an injured worker, regardless of whether the injured work elects to continue coverage.

64. In this case, claimant testified she had health insurance through her employer for her family. According to the COBRA letter entered into evidence, the cost of continuing the health insurance coverage for her entire family was $1,462.44 per month. Claimant testified she did not continue the coverage for her entire family because she could not afford it. Instead, she continued coverage for herself for one month. Respondents appear to concede in their position statement that if claimant makes no payment for any continuing COBRA benefit, claimant's AWW is increased by the full amount. Respondents argue that where the injured worker makes a reduced payment for continuing COBRA coverage for an individual as opposed to the family, however, the reduced payment is the amount that should be used for increasing the AWW under Section 8-40-201(19)(b).

65. Respondents argument would effectively reduce the COBRA coverage that should be included in the AWW in any case where an injured worker, such as the claimant in this case, elects to select coverage only for herself and not her family for financial reasons. This is not the intent of the Act. Because the Colorado Supreme Court has held that the cost of continuing the COBRA health insurance should be included in the AWW calculation regardless of whether the injured worker selects coverage, than the full cost of continuing the COBRA coverage should be included where the injured worker elects to limit the extent of the COBRA coverage.

66. It should also be noted that claimant in this case had health insurance for her entire family through her a health insurance plan provided by employer. The mere fact that claimant could not afford to continue this plan after she was terminated, and while her claim was still pending during a period of time in which claimant faced a significant financial hardship, should not serve to reduce claimant's COBRA calculation.

67. The ALJ finds that claimant's cost of continuing the health insurance coverage she actually received during her employment with employer is $1,462.44 per month, or $336.56 per week. The ALJ credits the COBRA letter entered into evidence in coming to this finding. The ALJ finds that combining the $336.56 for claimant's COBRA coverage to the previously stipulated AWW of $651.30, results in a new AWW of $987.86.

68. The ALJ credits the medical reports from Dr. Tice and Dr. Price and finds that the ongoing medical treatment provided by Dr. Price is reasonable and necessary to maintain claimant at MMI. The ALJ rejects the contrary opinions expressed by Dr. Bernton as unpersuasive in coming to the finding.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S.,

4. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor."

5. As found, based on the testimony of claimant at hearing and the corresponding medical records from Dr. Price dated February 7, 2014, claimant has proven by a preponderance of the evidence that she was referred by Dr. Tice to Dr. Price for consultation for pain management treatment. Claimant was also referred to Dr. Price by Dr. Winnefeld for an impairment rating. However, the referral from Dr. Winnefeld does not limit that referral claimant received from Dr. Tice to Dr. Price for medical treatment.

6. As found, respondents are liable for the cost of the medical treatment provided by Dr. Price as she is an authorized provider within the chain of referrals. Respondents are liable for the cost of the treatment provided by Dr. Price pursuant to the Colorado Medical Fee Schedule.

7. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

8. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

9. As found, the ALJ credits the opinions of Dr. Regan in his DIME report and finds that respondents have failed to overcome the opinions of Dr. Regan regarding the issue of permanent impairment by clear and convincing evidence. As found, the opinions of Dr. Regan are supported by the medical records and impairment rating provided by Dr. Price and are found to be credible and persuasive. As found, the ALJ credits the opinion of Dr. Regan regarding the cause of claimant's psychiatric condition and impairment and finds that respondents have failed to overcome the opinion by clear and convincing evidence. As found, claimant's psychiatric issues are related to her pain from the work injury and not related to "litigation stress".

10. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

11. As found, claimant has proven by a preponderance of the evidence that she was under work restrictions set forth by Dr. Tice and Dr. Winnefeld and was unable to resume her prior work due to the restrictions. As found, claimant has proven by a preponderance of the evidence that the restrictions were related to her February 7, 2012 work injury.

12. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

13. As found, respondents have failed to establish by a preponderance of the evidence that claimant committed a volitional act that led to claimant's termination of employment. As found, the ALJ credits the testimony of Ms. Burke and Ms. McKinney and finds that claimant was terminated after her work performance failed to improve, but not due to any volitional act on the part of claimant.

14. As found, the Agreement entered into evidence establishes that claimant was terminated as of February 27, 2013. The ALJ does not find that claimant voluntarily resigned her position in connection with the signing of the Agreement.

15. Section 8-40-201(19)(b), C.R.S. provides that the average weekly wage of an injured employee shall include the amount of the employee's cost of continuing the employer's group health insurance plan. The replacement cost of health insurance to the claimant shall be included in the claimant's average weekly wage. *State Compensation Insurance Authority v. Smith*, 768 P.2d 1256 (Colo. App. 1988). The plain language of Section 8-40-201(19)(b), C.R.S., says nothing that would require claimants to purchase health insurance in order for the cost of the insurance to be included in the average weekly wage, and the statute does not require the actual purchase of health insurance for the full amount to be included in the average weekly wage. *Ray, supra.* 145 P.3d at 668.

16. As the Colorado Supreme Court noted in *Ray*, the employer's argument that the injured worker be required to purchase the COBRA benefit fails to consider the significant delay that may occur between the time of employment termination and the

actual receipt of workers' compensation benefits. In this case, claimant was under active medical care for a denied workers' compensation claim at the time she was terminated. As found, claimant testified at hearing that she did not elect the full COBRA coverage due to the fact that she could not afford the full cost of continuing COBRA coverage. The ALJ finds that these facts are consistent with the findings of the Supreme Court in *Ray* to substantiate claimant's claim that her AWW should be based on the full cost of COBRA benefits as opposed to the limited coverage she elected for one month.

17. As found, claimant's cost of continuing the coverage she actually received during her employment with Employer is $1,462.44 per month, or $336.56 per week. Combining the $336.56 to the previously stipulated AWW of $651.30, results in a new AWW of $987.86.

18. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

19. As found, claimant has proven by a preponderance of the evidence that the proposed medical treatment recommended by Dr. Price is reasonable and necessary to maintain claimant at MMI.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits from November 26, 2013 and continuing until June 6, 2014 when claimant was placed at MMI.

2. Claimant's new AWW based on the cost of continuing her health insurance is $987.86. The AWW is effective February 27, 2013, her termination date.

3. Respondents shall pay claimant PPD benefits based on the impairment rating provided by Dr. Regan.

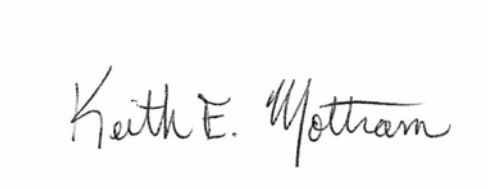
4. Respondents shall admit for post-MMI medical benefits.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 16, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right hand injury during the course and scope of his employment with Employer on September 2, 2014.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical benefits for his September 2, 2014 right hand injury.

3. Whether Concentra Medical Centers is Claimant's authorized treating provider.

4. Whether Claimant has proven by a preponderance of the evidence that medical treatment in the form of a right hand closed reduction procedure to be performed by Craig Davis, M.D. is reasonable, necessary and related to his September 2, 2014 industrial injury.

FINDINGS OF FACT

1. Employer is a correctional facility. Claimant worked for Employer as a Maintenance Supervisor. He performed general maintenance duties.

2. Claimant testified that on September 2, 2014 he was applying caulk between the floor and walls in the dining halls of Employer's facility. He reported that he was injured when he "stood up and struck his head on a metal box on the wall. It made him mad so he punched the box, and broke his hand."

3. Claimant reported the injury to supervisor Captain Christopher Todd Phillips on September 2, 2014. Captain Phillips explained that he gave Claimant a designated provider list on September 2, 2014. Claimant reported to Captain Phillips that he intended to seek medical attention for the injury to his right hand at Concentra Medical Centers.

4. On September 2, 2014 Captain Phillips also completed a Questionable Claim Notice regarding the September 2, 2014 incident. Captain Phillips documented in the Notice that Claimant came to his office and stated "You know that metal sick call box on the wall in the DRDC Dining Hall, I stood up and hit my head. I got mad and punched the box. Look at my hand."

5. Captain Phillips testified that Claimant's right hand injury occurred because Claimant was upset and punched the metal call box. Captain Phillips remarked that Claimant reported to him the only injury he incurred on September 2,

2014 was to his right hand. In his written and signed description of the incident completed on September 2, 2014 Claimant stated: "I was caulking the wall/floor joint when I stood up I hit my head on the sick call box. I retaliated by punching it. Result was an injury to my right hand smallest digit area."

6. Claimant testified that he had hit his head on the metal call box two times prior to striking it a third time and incurring an injury. Claimant commented that he took no action in response to the first time he hit his head on the metal call box. After the second time Claimant hit his head on the metal call box he retaliated by striking it with his right hand. The third time Claimant hit his head on the metal call box he again struck it with his right hand and fractured his fifth metacarpal.

7. Captain Phillips stated that "punching a metal call box is not part of any maintenance work duty." Claimant testified that he agreed punching the metal call box would not be included on any list of his job duties. However, he stated he believed it was a job duty because he was required to caulk the floor that caused him to be in the area where he eventually punched the metal call box.

8. Claimant remarked that he was aware the call box was metal and very hard before he punched it. He noted that he fractured the fifth metacarpal in his right hand because he intentionally punched the metal call box.

9. On September 2, 2014 Claimant obtained medical treatment at Concentra Medical Centers. Claimant was evaluated by Matt Miller, M.D. Dr. Miller documented that Claimant told him the injury occurred when "[p]atient stood up and hit head on box. In frustration, then punched the metal box with right hand." X-rays of Claimant's right hand demonstrated an angulated distal shaft fracture of the fifth metacarpal bone. Dr. Miller referred Claimant to Craig Davis, M.D. for anticipated right hand surgery.

10. On September 3, 2014 Claimant was evaluated by Dr. Davis at Colorado Orthopedic Consultants. Dr. Davis documented that Claimant reported the injury occurred when "he struck his hand on a box resulting in a fifth metacarpal neck fracture." During the office visit Dr. Davis performed a closed reduction followed by placing a cast with a fairly firm mold over the fracture. He noted that post reduction x-rays showed some improvement but Claimant still had a significant angulation and step-off on the oblique view. Dr. Davis remarked "I don't think this is an adequate reduction. I therefore recommend open reduction internal fixation." On September 12, 2014 Respondent filed a Notice of Contest because claimant's right hand injury was not work-related.

11. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable right hand injury during the course and scope of his employment with Employer on September 2, 2014. The persuasive evidence reflects that Claimant's September 2, 2014 right hand injury was self-inflicted.

12. Claimant testified that on September 2, 2014 he was applying caulk between the floor and walls in the dining halls of Employer's facility. He reported that he

was injured when he "stood up and struck his head on a metal box on the wall. It made him mad so he punched the box, and broke his hand." Captain Phillips credibly explained that Claimant's right hand injury occurred because Claimant was upset and punched the metal call box. In his written and signed description of the incident completed on September 2, 2014 Claimant detailed: "I was caulking the wall/floor joint when I stood up I hit my head on the sick call box. I retaliated by punching it. Result was an injury to my right hand smallest digit area."

13. Based on Claimant's written documentation, reports to his doctors, statements to Employer and testimony at hearing, he hit his head three times and actually used his right hand to hit the metal box twice. Claimant's confirmation that he hit his head three times and punched the box more than once demonstrates that Claimant thought about what had happened and made the conscious decision to punch the metal call box in retaliation. The persuasive evidence in the record supports the finding that Claimant did not hit the metal call box with his right hand immediately but only after the second time he hit his head. By the third time Claimant hit his head he already recognized that the call box was very hard and made of metal. Claimant thus had significant time to consider the action he was going to take. He did not react immediately without thinking after the first time he hit his head, but instead waited and did not punch the metal box in retaliation until after he had taken time to carefully consider his options. Claimant's action in punching the metal box was thus self-inflicted, intentionally motivated and retaliatory in purpose.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. The Act specifically provides that the right to recovery shall obtain "where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment and is not intentionally self-inflicted." §8-41-301(1)(c), C.R.S. Self-inflicted injuries are thus not compensable.

6. In *Leon v. Environmental Abatement Services*, W.C. No. 4-438-030 (ICAP, May 13, 2002).the Industrial Claim Appeals Office determined that Claimant's injury, incurred when he punched a window, was voluntarily self-inflicted and not compensable. The ALJ had concluded that "punching the broken window with a bare fist was almost certain to cause injury and evidences more than merely a failure to realize the probable consequences of a foolish act." *Id*. ICAP remarked that Claimant's motivation to strike the window was to "retaliate" against the employer. ICAP stated it was important to the evaluation of whether the injury was self-inflicted that Claimant did not instantaneously strike the window upon being directed to change jobs but instead first began walking to the new work station. *Id*.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable right hand injury during the course and scope of his employment with Employer on September 2, 2014. The persuasive evidence reflects that Claimant's September 2, 2014 right hand injury was self-inflicted.

8. As found, Claimant testified that on September 2, 2014 he was applying caulk between the floor and walls in the dining halls of Employer's facility. He reported that he was injured when he "stood up and struck his head on a metal box on the wall. It made him mad so he punched the box, and broke his hand." Captain Phillips credibly explained that Claimant's right hand injury occurred because Claimant was upset and punched the metal call box. In his written and signed description of the incident completed on September 2, 2014 Claimant detailed: "I was caulking the wall/floor joint when I stood up I hit my head on the sick call box. I retaliated by punching it. Result was an injury to my right hand smallest digit area."

9. As found, based on Claimant's written documentation, reports to his doctors, statements to Employer and testimony at hearing, he hit his head three times and actually used his right hand to hit the metal box twice. Claimant's confirmation that

he hit his head three times and punched the box more than once demonstrates that Claimant thought about what had happened and made the conscious decision to punch the metal call box in retaliation. The persuasive evidence in the record supports the finding that Claimant did not hit the metal call box with his right hand immediately but only after the second time he hit his head. By the third time Claimant hit his head he already recognized that the call box was very hard and made of metal. Claimant thus had significant time to consider the action he was going to take. He did not react immediately without thinking after the first time he hit his head, but instead waited and did not punch the metal box in retaliation until after he had taken time to carefully consider his options. Claimant's action in punching the metal box was thus self-inflicted, intentionally motivated and retaliatory in purpose.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 15, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues presented for determination are whether the Claimant sustained a compensable injury to his right shoulder on January 20, 2011; whether he is entitled to medical treatment for that injury; whether the surgery he underwent on September 13, 2012 was related to the January 20, 2011 injury; and whether Dr. Horan is an authorized provider.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant was involved in an incident on January 20, 2011, when he fell on ice while performing a rescue exercise. Claimant reported to the Employer that he injured his right shoulder and elbow to the Employer. He reported landing on his right elbow and jarring his right shoulder.

2. On January 21, 2011, Respondent timely provided Claimant with a designated provider list from which Claimant selected Dr. Elizabeth Bisgard. He was familiar with Dr. Bisgard and had received treatment from her many times in the past. While Claimant elected Dr. Bisgard, he conceded at hearing that he declined any medical treatment at that time.

3. On January 21, 2011, Kurt Muehler, the adjuster handling Claimant's workers' compensation claim documented Claimant's election to decline medical treatment and specifically informed Claimant that if he changed his mind to contact Respondent.

4. On January 26, 2011, Claimant saw his primary care physician, Dr. Louis Kasunic, at which time Claimant reported headaches and did not mention any shoulder complaints. Dr. Kasunic manipulated Claimant's cervical spine during this visit. At hearing, Claimant admitted that he did not report or treat for any type of shoulder complaints at that time, which was just six days after the slip and fall.

5. Claimant admitted that he did not seek any medical treatment for his right shoulder until he saw Dr. Steve Horan in June 2012.

6. It is undisputed that while Dr. Bisgard was the designated physician to the purported January 20, 2011 injury, Dr. Bisgard did not provide any treatment related to such incident.

7. While Claimant did not seek treatment with Dr. Bisgard for the right shoulder between January 20, 2011 and June 2012, he did see Dr. Bisgard for other body parts and underwent a fit-for-duty evaluation with her.

8. Claimant saw Dr. Bisgard on August 25, 2011, for a lumbar sprain, and made no shoulder complaints.

9. On November 23, 2011, Claimant underwent a fit-for-duty evaluation with Dr. Bisgard and did not mention any shoulder complaints. At that time, Claimant specifically denied having any numbness or pain in his arms, denied having any musculoskeletal problems, weakness in his arms, and specifically denied having any difficulty moving his arms.

10. On August 31, 2012, Claimant returned to Dr. Bisgard for a subsequent back injury. Claimant again conceded at hearing that he did not report any shoulder complaints.

11. On September 6, 2012, Claimant saw Dr. Bisgard for the back injury and did not report any shoulder problems nor did he report that he had seen Dr. Horan.

12. Claimant admitted that he did not seek treatment with Dr. Bisgard for his shoulder from January 20, 2011 through June 2012, but he initially testified that he did treat with Dr. Bisgard between January 2011 and June 2012 because "the shoulder pain got worse."

13. Claimant concedes that he did not receive any treatment from Dr. Bisgard for the January 20, 2011 injury, but he testified that he saw Dr. Bisgard prior to seeing Dr. Horan, but he could not recall when. While Claimant could not recall when, he testified that it was in person and in her office, yet Claimant acknowledged that there was no medical record documenting such appointment.

14. It is undisputed that the medical records are devoid of a referral from Dr. Bisgard to Dr. Horan. Further, when questioned about a referral, Claimant testified he did not need Dr. Bisgard to refer him to Dr. Horan because he had free choice through the Employer's policy to pick a surgeon.

15. Claimant testified that the Employer has written a policy that allows a claimant in a workers' compensation claim to select a physician of his own choosing. He recalled receiving this policy via e-mail through the Employer's read files that were distributed to all employees. Claimant did not submit a copy of the purported policy and ultimately conceded there was no written policy.

16. Claimant initially saw Dr. Horan on June 22, 2012, and underwent surgery on September 13, 2012. The Claimant provided his private health insurance information to Dr. Horan's office. Claimant conceded that he did not request authorization for surgery from Respondent and that it was CIGNA that authorized the surgery, and it was CIGNA that paid for it.

17. Claimant saw Dr. Bisgard on October 2, 2012 as part of his follow-up care and for another fitness for duty evaluation. Claimant reported to Dr. Bisgard that his shoulder injury dated back to high school when he fractured his clavicle but that he had done well since then up until January 2010. Claimant told Dr. Bisgard that he fell on his outstretched right hand while in his dive gear at work and that the incident occurred in January 2010. He told her that he had symptoms at that time which never resolved. Dr. Bisgard opined that Claimant's need for shoulder surgery related back to the January 2010 fall, and that she could not understand why the claim was not accepted.

18. On October 25, 2012, Claimant sustained a compensable injury to his right shoulder. Claimant received a designated provider list from Respondent and again selected Dr. Bisgard. Claimant sought and received treatment with Dr. Bisgard for such injury. It was after this injury that Dr. Bisgard referred Claimant back to his surgeon, Dr. Horan, to ensure that he had not torn anything from his prior surgery.

19. Dr. Nicholas Olsen testified as an expert in physical medicine and rehabilitation. Dr. Olsen evaluated Claimant and prepared a report dated December 19, 2013. During the hearing, Dr. Olsen clarified that due to Claimant's report that the injury occurred in 2010 rather than in 2011, he initially prepared his report with the understanding that the injury occurred in 2010. Once the date of injury was clarified, Dr. Olsen reissued his report which was not altered in any substantive manner. He merely disregarded some of the medical records as irrelevant because they predated the injury of January 20, 2011. Dr. Olsen issued his subsequent report on April 11, 2014.

20. Dr. Olsen testified that the September 13, 2012 surgery to repair Claimant's right shoulder did not relate to the January 20, 2011 incident. Claimant suffered a temporary aggravation of symptoms of his shoulder on January 20, 2011, which resolved within days after the injury.

21. In support of his opinions, Dr. Olsen testified that Claimant reported that he felt pain at 8-9 out of 10 at the time of the January 20, 2011 fall, but that Claimant continued to complete the training exercise "which included diving through this hole, pulling along a rope, and completing his maneuvers which would have been quite difficult to do if one had acutely torn the rotator cuff or labrum." Dr. Olsen testified that Claimant completed those activities and reported that within 24-48 hours, his pain level decreased to a 2 out of 10.

22. Dr. Olsen also pointed out that Claimant delayed treatment for 18 months while continuing to perform all of the duties of a firefighter, as well as heavy workouts. Claimant also reported participation in fairly aggressive activities which would require use of his upper extremities including snowboarding, and possible remodeling of homes. Dr. Olsen noted that Claimant appeared to be functioning at a high level for the18-month period between the slip and fall and the time he sought treatment with Dr. Horan.

23. Dr. Olsen testified when Claimant's right shoulder became symptomatic such that he needed surgery, it was the conditions at that time that led to his surgery, which is simply the degenerative process or wear and tear.

24. Dr. Olsen relied upon the operative report which he opined clearly reflects that there is no acute pathology, but instead reflects a degenerative shoulder. The Claimant has a similar history with respect to his left shoulder. Dr. Olsen noted that the operative report did not reflect any pathology that he could link to the type of fall that Claimant reported. Dr. Olsen explained that Claimant had a very large subacromial spur, which was pressing onto his rotator cuff space, into the labral area, which was surgically removed, which stemmed from a prior clavicular fracture. Dr. Olsen testified that "the size of the spur indicates that it had been there for a long time, it was chronic, and it developed over many years following an injury like a clavicular fracture."

25. According to Dr. Olsen, the type of pathology demonstrated on the operative report was very consistent with the wear and tear history that Claimant provided concerning his left shoulder, for which he had undergone a similar surgery.

26. As found above, Claimant saw his personal physician Dr. Kasunic within one week of the January 2011 slip and fall incident. Dr. Kasunic manipulated Claimant's cervical spine during that visit yet Claimant mentioned no right shoulder pain. Dr. Olsen found it significant that the record reflects no complaints of shoulder pain, because based on his experience as an osteopathic physician who performs manipulations, he finds it necessary to know whether a patient is having problems with his shoulders because it is essential to move the arms as you treat the neck, and if there is an underlying condition, he would want to know about it. Dr. Olsen would have expected Claimant to mention such injury just six days later to Dr. Kasunic in light of the fact that Dr. Kasunic was performing manipulation of Claimant's neck.

27. Dr. Olsen testified that had Claimant sustained a type of lesion for which surgery was performed in September 2012, he would not have expected Claimant to pass a fitness-for-duty evaluation in November 2011, nor would he have expected the Claimant to engage in the recreational activities described above.

28. The opinions of Dr. Olsen are credible and persuasive regarding the causal relatedness of the Claimant's need for treatment to the right shoulder to the January 20, 2011 incident. Dr. Bisgard's opinions to the contrary are not persuasive. She failed to address Claimant's failure to report to her on four separate occasions that he had ongoing right shoulder pain stemming from a January 2011 work incident. She also failed to account for Claimant's ability to work full duty and engage in physically demanding recreational activities a period of 18 months without any significant functional limitation.

29. Claimant testified that he did not tell medical providers everything that was wrong with him at every appointment. He stated that he complained about the physical problem that prompted him to set the appointment.

30. The Claimant recalled that he had a specific moment when he tried to drink coffee and as he raised the cup with his right arm to drink, he felt shearing pain. He testified at that moment he realized that the motion he made with his arm was essential to his job.

31. The Judge is not persuaded by Claimant's explanations concerning his lack of treatment for 18 months or his failure to report shoulder pain to any medical provider, particularly Dr. Bisgard on four separate occasions (one of which was just one week prior to his right shoulder surgery). He knew he had selected Dr. Bisgard as a treating provider for his shoulder so it would make sense he would notify her of his right shoulder problems had they progressed as he described. His explanations concerning the Employer's physician referral policies also lack credibility.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of " requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the

injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.*

5. Claimant has failed to prove that the incident on January 20, 2011, produced the need for treatment especially the right shoulder surgery he underwent on September 13, 2012. The remoteness of the work incident to the date on which the Claimant initially sought treatment presents serious doubts as to whether the incident produced the need for medical treatment. In addition, during the 18-month period between January 2011 and June 2012, the Claimant continued to work full duty as a firefighter, and engage in physical recreational activities. It is apparent Claimant's function was not significantly impaired during this period of time. Further, the Judge credits Dr. Olsen's testimony and opinions concerning the degenerative changes in Claimant's right shoulder found during the surgery. The opinions of Dr. Bisgard and Claimant's testimony were not persuasive for the reasons set forth above.

ORDER

It is therefore ordered that Claimant's claim for benefits under the Colorado Workers' Compensation Act is denied and dismissed. The remaining issues are rendered moot.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 21, 2015

DIGITAL SIGNATURE:

L. Broniak

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined by this Order are:

1. Whether the claimant proved, by a preponderance of the evidence, that the treatment she received on July 15, 2013 and July 16, 2013 at the Memorial Hospital was reasonable, necessary, and related to the admitted September 26, 2012 industrial injury; and

2. Whether the claimant proved, by a preponderance of the evidence, that the July 16, 2013 services provided by Ute Pass Regional Ambulance District were reasonable, necessary, and related to the admitted September 26, 2012 industrial injury.

FINDINGS OF FACT

1. The claimant is a 62-year-old woman with an October 26, 1952 date of birth.

2. The claimant was hired by the respondent-employer on June 28, 2005 to work as a cashier.

3. The claimant was initially injured in an admitted accident on November 17, 2009, when, while walking in the parking lot coming to work, she slipped on some ice, landing on her back, and hitting her head and left elbow. A magnetic resonance image ("MRI") performed in December 2009 showed herniated or bulging discs in the lumbar spine and cervical spine. The claimant received conservative care from Dr. James and Dr. Bjork, including epidural steroid injections. The claimant complained to Dr. James about headaches.

4. In 2008, the claimant received treatment for migraine headaches. At hearing, the claimant denied ever experiencing, or receiving treatment for, migraine headaches prior to the November 17, 2009 injury.

5. On January 16, 2012, Dr. James placed the claimant at maximum medical improvement (MMI) from the November 17, 2009 injury, as of August 23, 2011. He

imposed permanent restrictions against lifting over five pounds or performing any overhead reaching.

6. The November 17, 2009 accident is the subject of W.C. No. 4-812-192, and is not currently at issue.

7. On September 26, 2012, the claimant suffered the subject injury when she tripped on a mat in the fitting room area and fell straight down on her right knee. The claimant denied headache, dizziness, or visual disturbances, but was complaining of pain at a level 10/10 in the lumbar spine region. The claimant was transported by Ute Pass Regional Ambulance to Pikes Peak Regional Hospital, where she was diagnosed with a right knee strain and a low back strain. X-rays of the right knee and lumbar spine were obtained. The x-rays were read as showing degenerative changes, without evidence of acute injury.

8. Dr. Matthew Young was designated to treat the claimant's injuries arising out of the September 26, 2012, accident. On February 4, 2013, the claimant presented to Dr. Young and reported her low back pain was at pre-injury baseline, but "she had a new symptom of headache". The claimant denied any prior history of migraines.

9. On July 15, 2013, the claimant presented to the Memorial Hospital Emergency Room complaining of a headache. The claimant had "some difficulty narrowing down her onset, progression, or length of her symptoms." Ultimately, the claimant stated she "has had headaches most of her life." The claimant also reported noticing some blood on a swab from her ear three days prior, with pressure in her ear ever since. On review of symptoms, the claimant complained of ear pain and global headache, with no neck pain. On physical exam, the TM showed erythema and some blood in the ear canal. A CT of the head was obtained, with the indication "new and changing headache". The CT was read as unremarkable. The claimant was discharged home with ear drops, antibiotics, and Percocet for pain. The claimant's discharge diagnoses included, "headache" and "left otitis media with possible small tympanic membrane perforation."

10. Neither the claimant nor the attending physicians related the claimant's July 15, 2013 headache and ear pain to the September 26, 2012 industrial accident. Memorial Hospital's July 15, 2013 treatment notes do not reference the claimant's September 26, 2012 work injury.

11. On discharge, the claimant guaranteed payment of the July 15, 2013 Memorial Hospital ER bill, with no indication her complaints were related to a work injury, with the respondent-insurer being responsible for payment.

12. The claimant returned to the Memorial Hospital Emergency Room, on July 16, 2013, transported by Ute Pass Regional Ambulance, at approximately 9:56 p.m. The claimant stated she was experiencing a headache that started at 8:30 or 9:00 p.m., the previous night. The claimant complained of light flashes and severe ringing in the ears that was "worse than normal." The attendant's impression was "pain – nontraumatic." The assessment was "HA of unknown etiology." Neither the claimant, nor the ambulance attendants, related the claimant's July 16, 2013 headache to the September 26, 2012 work injury. Ute Pass' July 16, 2014 notes do not reference the claimant's September 26, 2012 work injury.

13. At the Memorial Hospital Emergency Room on July 16, 2013, the claimant gave a history of headache that was "a little more abrupt in onset than her typical migraine headache." The attending ER doctor noted the claimant had treated for headache on July 15, 2013, but the claimant thought the July 16, 2013 headache was "different." The claimant's husband felt the headaches were "similar."

14. The claimant took only one of the Percocet prescribed on July 15, 2013, before returning to the ER on July 16, 2013. In the approximate 24-hour period after her July 15, 2013 ER visit and the July 16, 2013 ER visit the claimant did not contact, nor seek treatment with, Dr. Young, the physician authorized to treat the September 26, 2012 work injury.

15. At the ER on July 16, 2013, the claimant again reported a long history of migraine, "since 2005." The claimant wondered if the July 15, 2013 headache was "just a migraine." The claimant denied any neck pain or neck stiffness, as well as any recent trauma to the head.

16. On physical exam, the claimant was not in any acute distress. The claimant was calm and appropriate, with a normal physical and neurological exam, save a "very abnormal TM" due to prior surgery and radiation. The claimant was discharged home to follow up on an outpatient basis. The attending physician's clinical impression was "headache, most likely migrainous in etiology." Neither the claimant, nor any treating provider, related the claimant's July 16, 2013 headache to her September 26, 2012 work injury. .

17. On discharge, the claimant guaranteed payment for the July 16, 2013 treatment at the Memorial Hospital ER, with no indication the treatment was related to a work injury, and the respondent-insurer was liable for payment. Memorial Hospital's July 16, 2013 treatment notes do not reference the claimant's September 26, 2012 work injury.

18. At the time she underwent ambulance transport and ER treatment on July 16, 2013, the claimant herself did not relate her symptoms to the September 26, 2013 accident. The claimant testified she thought her July 16, 2013 symptoms might have been caused by a "stroke."

19. The claimant initially related the onset of headache to the November 17, 2009 accident, not the September 26, 2012 accident.

20. The claimant's testimony that she had no history of migraine prior to September 26, 2012 is not credible or persuasive.

21. The claimant's testimony that her need for medical treatment on July 15, 2013 and July 16, 2013 and ambulance transport on July 16, 2013, is related to the September 26, 2012 accident is not credible or persuasive.

22. The claimant failed to prove, by a preponderance of the evidence, that the treatment she received at the Memorial Hospital on July 15, 2013 for blood in the ear and headache was reasonable, necessary, and related to the September 26, 2012 accident.

23. The claimant failed to prove, by a preponderance of the evidence, that the ambulance transport to Memorial Hospital Emergency Room on July 16, 2013 for a headache of "unknown etiology" was reasonable, necessary, and related to the September 12, 2012 industrial accident.

24. The claimant failed to prove, by a preponderance of the evidence, that the treatment received at the Memorial Hospital Emergency Room on July 16, 2013, was reasonable, necessary, and related to the September 26, 2012 industrial injury.

25. The claimant took no steps to obtain treatment from the authorized treating physician in connection with either her July 15, 2013, or subsequent July 16, 2013, trip to the Memorial Hospital Emergency Room. The claimant took only one of

her prescribed pain pills in the 24-hour period following her initial ER visit, before returning to the ER.

26. The claimant failed to prove, by a preponderance of the evidence, that the Memorial Hospital July 15 and 16, 2013 treatment was a *bona fide* emergency, and that her condition was so acute, and the need for treatment so immediate, she could not wait and obtain treatment from the ATP.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq*. C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interests. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

3. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

4. The claimant has the burden of proving entitlement to medical benefits by a preponderance of the evidence. Section 8-43-201, C.R.S; *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

5. As found, the claimant failed to prove, by a preponderance of the evidence, that the treatment she received at the Memorial Hospital Emergency Room on July 15, 2013 and July 16, 2013, was reasonable, necessary, and related to the September 26, 2012 accident.

6. As found, the claimant failed to prove, by a preponderance of the evidence, that the July 16, 2013 ambulance transport by Ute Pass Regional Ambulance to the Memorial Hospital Emergency Room was reasonable, necessary, and related to the September 26, 2012 accident.

7. Medical services provided in a *bona fide* emergency are an exception to the normal requirement that the claimant obtain authorization for all treatment of the industrial injury. *Larson's Workers' Compensation Law*, § 94.02[6] (1999); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

8. Awards of emergency medical treatment where the claimant's condition was so acute, and the need for treatment so immediate, that the claimant could not reasonably wait for authorization or a hearing to obtain permission for the treatment**.** *See Lucero v. Jackson Ice Cream*, W.C. No. 4-170-105 (January 6, 1995); *Ashley v. Art Gutterson*, W.C. No. 3-893-674 (January 29, 1992).

9. As found, the claimant failed to prove, by a preponderance of the evidence, that the treatment received July 15, 2013 and July 16, 2013, at the Memorial Hospital Emergency Room was a *bona fide* emergency.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for an award of medical benefits for treatment received July 15, 2013 and July 16, 2013 at the Memorial Hospital is denied and dismissed.

2. The claimant's request for an award of medical benefits for treatment received July 16, 2013 through Ute Pass Regional Ambulance District is denied and dismissed.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 8, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant sustained a compensable injury to his left knee under W.C. No. 4-903-327-02 as a consequence of his right knee injury.

2. Whether Claimant sustained a compensable injury to his low back under W.C. No. 4-903-327-02 as a consequence of his right knee injury.

3. Whether Claimant sustained a compensable injury to his neck under W.C. No. 4-903-327-02 as a consequence of his right knee injury.

4. Whether Claimant sustained a compensable injury to his left knee on March 22, 2013 in W.C. No. 4-948-409-01.

5. Whether Claimant sustained a compensable injury to his low back on January 19, 2014 in W.C. No. 4-940-620-01.

STIPULATIONS

1. If Claimant's left knee injury is found compensable, in either W.C. No. 4-903-327-02 or W.C. No. 4-948-409-01, then the treatment Claimant received for his left knee was reasonable, necessary, and causally related to the injury.

2. If Claimant's low back injury is found compensable, in either W.C. No. 4-903-327-02 or W.C. No. 4-940-620-01, then the physical therapy recommended by his authorized treating physician is reasonable, necessary, and causally related to the injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a night clerk with duties including unloading pallets from trucks, breaking down truck deliveries, taking grocery products to the proper aisles of the grocery store, and stocking items on the store shelves.

2. As a part of his job duties, Claimant lifted merchandise in excess of 100 pounds, pushed and pulled pallets using both automated and non automated jacks, and placed merchandise at low and high shelf levels.

3. On October 31, 2012 Claimant was seen by Elena Weinstein, M.D. at Centura Health. Claimant complained of intermittent, but very frequent swelling and pain in his bilateral hands, knees, ankles, wrists, and shoulders for most of his life. Claimant reported to Dr. Weinstein that he had back pain, joint pain, joint swelling, limited range of motion, neck pain, muscle aches, and stiffness. On examination, Claimant had pain with range of motion of his cervical spine. The abduction and external rotation of both of Claimant's hips was limited by pain as was his lumbosacral flexion. Claimant had tenderness in both knees, tenderness of the thoracic spine, and tenderness over both sacroiliac joints. *See* Exhibit L.

4. Dr. Weinstein's impression was inflammatory polyarthropathy disorder, characterized by back pain, multiple joint pain, and neck pain. *See* Exhibit L.

5. On November 7, 2012 Claimant sustained an admitted work related injury to his right knee. Claimant twisted his knee while unloading pallets off a truck, felt a pop sensation, and had an immediate onset of pain.

6. On November 8, 2012 Claimant sought treatment for his right knee at Kremmling Memorial Hospital Emergency Department. Claimant did not report a prior history of pain in his bilateral knees when receiving treatment. *See* Exhibit 12.

7. On November 8, 2012 Claimant also saw Mark Paulsen, M.D. who assigned work restrictions of no weight bearing. On November 14, 2014 Claimant saw Meghan R. Mont, D.O. who returned Claimant to light duty work. Claimant did not report to Dr. Paulsen or Dr. Mont his prior history of bilateral knee pain. *See* Exhibit 6.

8. On December 10, 2012 an MRI showed that Claimant had a torn medial meniscus and Claimant was referred to Alexander K. Meininger, M.D. Dr. Meininger eventually performed an arthroscopic partial medial meniscectomy on January 11, 2013. *See* Exhibit 7.

9. On February 12, 2013 Claimant was seen by Dr. Meininger for follow up. Claimant was noted to be doing well post surgery. As part of the exam, Claimant's lower left extremity was noted to have full hip, knee, and ankle range of motion with no tenderness, no instability, no effusion, and 5/5 strength from proximal to distal. *See* Exhibit 7.

10. Claimant returned to work on February 12, 2013.

11. On March 14, 2013 a physical therapy note indicated Claimant was having increased pain in his left knee when squatting or attempting to put pressure on his left knee. *See* Exhibit 14.

12. On March 19, 2013 a physical therapy note indicated Claimant's left knee range of motion was reduced by 5% and that Claimant was receiving treatment to increase left leg extension. *See* Exhibit 14.

13. On March 22, 2013 Claimant alleges an acute injury to his left knee while stocking shelves. Claimant alleges while breaking down a pallet and going from a squatting to a walking position he twisted and felt pain and a loud pop in his left knee. He alleges give-way of his left knee.

14. Witness Brooks testified that on March 22, 2013 he was working with Claimant unloading a pallet when he heard a box fall and Claimant say, "ow." Witness Brooks made sure Claimant was okay and they both kept working.

15. On March 26, 2013 Claimant had a follow up visit with Dr. Meininger. Dr. Meininger noted that Claimant's right knee following surgery was resolved without any complaints of pain or instability. Dr. Meininger then noted that Claimant had recurrent left knee pain with increasing activities. The location of the pain was medially based and associated with clicking and loss of motion. Dr. Meininger noted forced knee flexion and positive medial joint line tenderness. Dr. Meininger noted that Claimant was not having any instability to giving away episodes. *See* Exhibit 7.

16. Claimant did not report to Dr. Meininger that he had a specific give way incident or acute injury to his left knee a few days prior.

17. On April 3, 2013 Claimant reported to Dr. Paulson that he was ambulating at work on March 22, 2013 and carrying a 35 pound item when his left knee gave way and he heard a pop. Claimant complained of sharp left knee pain anterior/medial in nature and location. *See* Exhibit 14.

18. On April 3, 2013 Claimant slid a note under his supervisor's door that stated, "on or about 3-22 I was walking and I was stocking aisle 3 when I felt my left knee give out, I'm not sure what happened but my left knee is bothering me. I am putting a lot of weight on it to counter my right knee. I have told my supervisor about this when it happened and I need to have it seen before it gets worse. My left knee is not as strong as it use to be and it is getting harder to get up and down from the floor when stocking." *See* Exhibit R.

19. On April 3, 2013 store manager Tonja Kelm filled out an Employee Incident Questionable Claim Form stating that Claimant left a note under her office door that morning. Ms. Kelm indicated that at this time, Claimant did not want to file a claim and that Claimant felt as though his left knee was sore from using it more due to surgery on his right knee in late 2012. Ms. Kelm noted that Claimant was going to see his primary care physician for treatment. *See* Exhibit R.

20. On April 11, 2013 Claimant saw Dr. Mont for his left knee pain. Dr. Mont assessed left knee pain and believed it was new pain that she suspected was related to compensatory walking due to Claimant's original right knee injury. Dr. Mont noted Claimant had no history of left knee pain or injury in the past. Claimant reported subjectively that the pain in his left knee began on March 22, 2013 but did not report to

Dr. Mont a specific incident on March 22, 2013, just that the pain began on that date. *See* Exhibit 6.

21. At the April 11, 2013 appointment Dr. Mont was unaware of and did not document Claimant's prior history of bilateral knee pain and swelling for most of his life. Dr. Mont was unaware of and did not document a specific acute injury to Claimant's left knee that occurred on March 22, 2013. Dr. Mont noted that Claimant's was now having knee pain in the opposite knee as he had surgery on and that his left knee pain was worse with load bearing, squatting, and after sitting or working for a long period of time and that it began on March 22, 2013. *See* Exhibit 6.

22. Dr. Mont is not level II accredited and has not taken level II accreditation courses on the process for determining medical causation. In her testimony, Dr. Mont could not say with confidence that she knew what happened to cause Claimant's left knee pain. However, after a review of the medical reports, Dr. Mont opined that Claimant's left knee pain was caused both by overuse/overcompensation related to Claimant's original right knee injury and due to a specific incident on March 22, 2013.

23. At the April 11, 2013 appointment, Dr. Mont ordered an MRI of Claimant's left knee. *See* Exhibit 6.

24. On April 29, 2013 an MRI of Claimant's left knee was performed by Frederick Jones, M.D. Dr. Jones concluded that Claimant had a horizontal degenerative tear in the posterior horn of the medial meniscus that appeared to communicate with the undersurface and free edge of the meniscus near the posterior meniscal root. *See* Exhibit 10.

25. On June 25, 2013 Claimant underwent left knee surgery with Dr. Meininger. Dr. Meininger performed a left knee arthroscopy with partial medial meniscectomy. Claimant reported to Dr. Meininger that he was performing a squat on March 22, 2013 when he noticed an immediate onset of left knee pain that he reported was identical to the pain he had in his right knee when he suffered his right knee injury. *See* Exhibit O.

26. The report to Dr. Meininger on June 25, 2013 of a specific incident on March 22, 2013 with an immediate onset of left knee pain was very different from Claimant's earlier report to Dr. Meininger made on March 26, 2013 when Claimant reported recurrent left knee pain with increasing activities and no specific give way episode.

27. On July 30, 2013 Claimant had a follow up appointment with Dr. Meininger. Dr. Meininger did not note any injury to Claimant's back or neck during the course of the appointment. *See* Exhibit 7.

28. On July 31, 2013 Claimant saw Dr. Mont. Dr. Mont noted that Claimant woke up that morning very sore from his waistband up to his neck, and Claimant alleged

he was injured during his appointment the day prior with Dr. Meininger. Dr. Mont did not document nor did Claimant explain exactly how or when during his appointment with Dr. Meininger for follow up for his left knee surgery he suffered an injury from his waistband up to his neck. *See* Exhibit 6.

29. On September 9, 2013 Dr. Mont again saw Claimant. Claimant complained of low back pain, upper back pain, and neck pain. Dr. Mont suspected that due to his right sided knee/leg pain, Claimant might be overcompensating using his upper extremities, causing a strain. *See* Exhibit N.

30. Dr. Mont testified that she thought Claimant's back pain could be work related.

31. On January 8, 2014 Claimant underwent and Independent Medical Evaluation with John Hughes, M.D. Claimant reported to Dr. Hughes that after returning to work following his right knee surgery, his left knee began to hurt. Claimant attributed this to work-related activities and noted that he was not injured per se but had the gradual onset of left knee pain and weakness in the left leg. Claimant also reported to Dr. Hughes that he had the onset of interscapular and low back pain due to his antalgia of gait, that the back pain emerged since his left knee issues in March of 2013, and that the low back pain continued to be symptomatic. Claimant did not report to Dr. Hughes a sudden onset of low back pain on July 31, 2013 following his appointment with Dr. Meininger. Dr. Hughes opined that Claimant's lumbar spine and interscapular pain were of unclear etiology. *See* Exhibit V.

32. On January 19, 2014 Claimant alleges he suffered a new specific injury to his low back and that he felt a sharp pain when unloading a pallet in the back of a delivery truck.

33. Witness Brooks testified that the pallet they were attempting to unload was in tight and they were having trouble getting it out. While taking a "breather" witness Brooks indicated that Claimant stated his back was starting to hurt.

34. On January 24, 2014 Claimant saw Dr. Paulson who documented that Claimant felt a sharp pain in his lower back five days prior.

35. On February 3, 2014 Claimant underwent an Independent Medical Evaluation with J. Raschbacher, M.D. Dr. Raschbacher found no objective findings at either knee other than healed surgical scars. Dr. Raschbacher noted Claimant had pre-existing degenerative changes at both of his knees, a diagnosis of rheumatoid arthritis that can affect knee joints, and a history of chronic pain. Dr. Raschbacher opined that Claimant did not injure his left knee by "overcompensating" for his right knee injury as medical literature does not support the overcompensation theory and as the left knee MRI on April 29, 2013 showed a degenerative tear. Claimant reported to Dr. Raschbacher that Claimant's back pain began after a specific incident on January 19, 2014 and that he did not have back pain prior to that date. *See* Exhibit W.

36. Claimant did not report to Dr. Raschbacher the low back pain documented by Dr. Weinstein in October of 2012, did not report the sudden onset of low back pain documented by Dr. Mont in July of 2013, nor did he report the low back pain beginning in March of 2013 documented by Dr. Hughes.

37. Dr. Raschbacher opined that Claimant's left knee complaints and his lower back complaints were not work related, and that the only work related component to Claimant's admitted industrial injury was Claimant's right knee and that the other injuries were non-occupational. *See* Exhibit W

38. Dr. Raschbacher is level II accredited. He opined that there is no scientific medical support for the proposition that favoring one leg could damage another leg. Dr. Raschbacher also noted that Claimant had documented complaints of pains at his hands, knees, ankles, wrists, and shoulders for most of his life. Also noted was that Claimant had medical conditions of gout and rheumatoid arthritis that can cause pain and tissue injury at multiple joints. Finally, Dr. Raschbacher noted that Claimant provided inaccurate medical histories.

39. Dr. Raschbacher opined that Claimant's failure to be truthful regarding the prior problems in his left and right knees reported to him and to other medical providers compromises the ability to assess the situation and perform a causation analysis.

40. Claimant's testimony and reports to medical providers is found inconsistent and incredible. Claimant has provided multiple explanations and theories for the pain in his left knee, low back, and neck. Claimant failed to report symptoms, pain, and events to different medical providers and when viewing the inconsistencies in whole, the Claimant is found not credible or persuasive.

41. Multiple medical providers relied upon Claimant's explanations of mechanism of injury and onset of pain in forming their opinions. The medical opinions that relied upon Claimant's statements, which after a review of all the evidence were clearly inconsistent, are therefore not found persuasive or reliable as they are based on conflicting information provided by Claimant.

42. The opinion of Dr. Raschbacher after reviewing all of Claimant's records and inconsistent statements that Claimant's left knee pain, low back pain, and neck pain were not work related or compensable is found credible and persuasive.

43. On August 12, 2014 Dr. Hughes issued a supplemental report to his IME report. Dr. Hughes noted in this report that he was puzzled by Claimant's history of the gradual onset of left knee pain since Dr. Hughes found documentation that Claimant sustained a left knee injury performing a squat on March 22, 2013. Despite the direct report to Dr. Hughes that Claimant made of having a gradual onset of left knee pain, Dr. Hughes opined in his supplemental report that Claimant sustained a discrete left knee injury on March 22, 2013 and opined that it was work related. *See* Exhibit V.

44. The opinion of Dr. Hughes is not credible or persuasive and does not account for Claimant's multiple inconsistencies and reports to multiple providers of different onsets of pain.

45. The opinion of Dr. Mont is not credible or persuasive and does not account for Claimant's multiple inconsistencies and reports to multiple providers of different onsets of pain. Dr. Mont does not provide specific information to support her belief that overcompensation for a right knee injury caused Claimant's low back pain or neck pain.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2013). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. V. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. *See* § 8-41-301, C.R.S. (2014). The Claimant must establish that the injury meets this two pronged requirement by a preponderance of the evidence. *See* § 8-43-201(1), C.R.S. (2014).

The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The arising out of requirement is satisfied when it is shown that there is a causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968). An injury "arises out of" employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. Pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007).

Left knee

Claimant has failed to meet his burden to show that he suffered an injury to his left knee that occurred in the course of and arose out of his employment with employer. The ALJ is not persuaded by Dr. Mont's conclusion that Claimant's left knee injury occurred both due to overcompensating due to Claimant's right knee injury and that the left knee injured occurred also due to a specific incident on March 22, 2013. Rather, the ALJ credits the opinion of Dr. Raschbacher that any injury to Claimant's left knee was related to the natural progression of Claimant's preexisting degenerative left knee condition, as shown by MRI. Dr. Mont and Dr. Hughes, who both opined that Claimant's left knee condition was related to his employment, based their opinions in part on subjective information provided by Claimant as far as how and when his left knee pain began. Claimant, however, is found not credible or persuasive. As the medical opinions on causation were based in part on Claimant's unreliable reports, the opinions are not found persuasive.

Claimant has failed to meet his burden to show, more probably than not, that he suffered a discrete injury to his left knee on March 22, 2013. Claimant's allegation of a specific incident where he injured his left knee while unloading a pallet and either twisting, walking, or squatting on March 22, 2013 is not found credible. Claimant reported to Dr. Meininger that the left knee pain he suffered on March 22, 2013 was an immediate pain that was identical to the pain Claimant had experienced when he previously injured his right knee. Despite this report to Dr. Meininger, Claimant did not seek emergent treatment for his left knee and did not even mention this discrete incident a few days later at his March 26, 2013 appointment. This is not reasonable nor is it logically credible. When Claimant suffered his right knee injury, Claimant sought emergent treatment a day later. If the pain in fact was identical to his right knee injury, it is illogical that Claimant would not have sought treatment for four days and when he sought treatment four days later, it is illogical that Claimant would not even have mentioned the specific incident that caused his alleged onset of left knee pain. In fact, as found above, Claimant did not even report this March 22, 2013 incident that allegedly caused him immediate left knee pain until April 3, 2013. Claimant also reported to Dr. Hughes that he had not been injured per se, but that after his return to work following his right knee surgery, his left knee began to hurt. Medical records show Claimant had constant and chronic left knee pain and swelling prior to March of 2013, and show degenerative changes in Claimant's left knee. Claimant's medical history, combined with his inconsistent reports of onset of pain, fails to establish more likely than not that there is a causal connection between his left knee pain and his employment. Claimant has failed to meet his burden to show he suffered a discrete left knee injury on March 22, 2013.

Claimant has also failed to prove, by a preponderance of the evidence that his left knee pain was due to "overuse" or overcompensation as related to his compensable right knee injury and surgery. Rather, as found above, the opinion of Dr. Raschbacher is persuasive and credible that there is no medical support for this theory. Dr. Mont failed to identify medical support for this theory and her opinion was not made with sufficient support or explanation. Dr. Raschbacher is found more credible and persuasive than Dr. Mont and Claimant has failed to meet his burden to show more likely than not that his left knee pain was due to overuse or overcompensation.

Lower back

Claimant has failed to meet his burden to show that he suffered a compensable injury to his low back on January 19, 2014. As found above, Claimant had numerous reports of low back pain with different dates of the onset of pain. Claimant reported an onset of low back pain that started and was consistent from the time of his left knee pain and from March 2013 and ongoing. Claimant also reported an immediate onset of low back pain on July 31, 2013 that he believed was due to testing performed on his knee by Dr. Meininger on July 30, 2013. Finally, Claimant reported an immediate onset of low back pain on January 19, 2014 while unloading a pallet at work. Witness Brooks testified surrounding the January 19, 2014 event that Claimant reported his low back was starting to hurt while they were unloading a pallet at work. Even if Claimant's back started to hurt on January 19, 2014 while at work, Claimant has failed to show that he

suffered a discrete work injury. An incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007). As found above, the evidence clearly establishes that Claimant had low back pain prior to January of 2014.

Claimant reported in October of 2012 to Dr. Weinstein that he had back pain. Dr. Weinstein noted on examination that Claimant's lumbosacral flexion was limited by pain, and that Claimant had tenderness of the thoracic spine. Claimant next reported on July 31, 2013 to Dr. Mont that he injured his neck and back at an appointment the day prior with Dr. Meininger when Dr. Meininger was performing testing on Claimant's injured knee. Despite this specific report of injury to neck and back, Dr. Mont opined that due to Claimant's right sided knee/leg pain Claimant was overcompensating using his upper extremities, which had caused a strain. Dr. Mont opined that the July 2013 report of back pain could be work related due to overcompensation. Claimant then reported to Dr. Hughes on January 8, 2014 that his low back pain began in March of 2013 when his left knee pain started and that he thought it was due to antalgia of gait. Claimant reported on January 8, 2013 that his low back pain continued to be symptomatic. Claimant did not report to Dr. Hughes the low back pain that he had since October of 2012 nor did he report to Dr. Hughes the specific onset of back pain that he allegedly suffered on July 30, 2013 at an appointment with Dr. Meininger. Claimant next underwent an IME with Dr. Raschbacher where Claimant reported that his low back pain began on January 19, 2014 and that he did not have back pain prior to January 19, 2014. This is directly contradicted by Claimant's own reports of back pain in October, 2012, March of 2013, and July of 2013.

Claimant's numerous contradicting statements render him incredible. Based upon medical reports, the ALJ concludes that Claimant had low back pain prior to January 19, 2014. With documented low back pain as early as October of 2012, and with an incredible and inconsistent report of the onset of pain, Claimant has failed to meet his burden to show he suffered a work injury on January 19, 2014 that either caused or accelerated his pre-existing low back pain. Claimant's theory of overuse and overcompensation as related to his lower back pain is also not found credible or persuasive. Dr. Mont is not found persuasive in opining that Claimant may have been overcompensating using his upper extremities due to his right sided knee/leg pain. Her opinion is not explained thoroughly nor is it made with medical certainty as to the cause of his low back pain, but rather, Dr. Mont thinks the pain "may" have been due to overcompensation. Claimant has failed to establish by a preponderance of the evidence a causal connection between his low back pain and his employment or that his low back pain was causally related to his original right knee injury.

Neck

Claimant has failed to meet his burden to show that he suffered an injury to his neck that arose out of and in the course of his employment with Employer. Claimant alleges that his neck was injured during a medical appointment for his knee on July 30,

2013. It is undisputed that injuries sustained during treatment of an industrial injury are compensable under the "quasi-course of employment" doctrine. *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993). Although the medical appointment on July 30, 2013 may arguably be covered under the quasi course of employment doctrine, Claimant has failed to present evidence that he suffered an injury during that medical appointment or due to that medical appointment. Although Claimant reported waking up the next day with stiffness and soreness in his back and neck, he failed to identify what at that appointment may have caused his stiffness/soreness in his back and neck or that he suffered a compensable injury during that appointment. Rather, the medical history shows that Claimant had stiffness and soreness in his back and neck for most of his life and the evidence does not support a conclusion, more likely than not, that Claimant suffered a compensable injury during this medical appointment. Additionally, although Dr. Mont noted that Claimant may have been overcompensating using his upper extremities, due to his right side knee/leg pain, Claimant failed to present evidence of overcompensation and Dr. Mont's statement was without specificity and is not persuasive that Claimant actually suffered a neck injury due to overcompensation. Claimant has failed to establish by a preponderance of the evidence a causal connection between his neck pain and his employment or that his neck pain was causally related to his original right knee injury.

ORDER

It is therefore ordered that:

1. Claimant did not suffer a left knee injury in W.C. No. 4-903-327-02 as a consequence of his prior right knee injury. His claim for compensation is denied and dismissed.

2. Claimant did not suffer a low back injury in W.C. No. 4-903-327-02 as a consequence of his prior right knee injury. His claim for compensation is denied and dismissed.

3. Claimant did not suffer a neck injury in W.C. No. 4-903-327-02 as a consequence of his prior right knee injury. His claim for compensation is denied and dismissed.

4. Claimant did not sustain a compensable injury to his left knee on March 22, 2013 in W.C. No. 4-948-409-01 and his claim for compensation is denied and dismissed.

5. Claimant did not sustain a compensable injury to his low back on January 19, 2014 in W.C. No. 4-940-620-01 and his claim for compensation is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 22, 2015

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

BASIS FOR SUPPLEMENTAL ORDER

A Petition to Review was filed by Respondents on October 29, 2014. Respondents base the petition on the grounds that conflicts in the evidence were not resolved in the AL's order and that the ALJ's findings of fact did not support the order. In the initial order, the ALJ, on some occasions, summarized more lengthy testimony regarding a finding of fact. To further clarify and assist the parties, the ALJ has added direct testimony from the transcript of the hearing to establish the basis for her summaries or reasonable inferences and made other clarifications. The paragraphs in the findings of fact that have been modified are paragraph #s 8, 9, 22, 23, 24 and 25.

ISSUES

1. Whether the Claimant proved by a preponderance of the evidence that he sustained a worsening of his condition that would entitle him to a reopening of W.C. 4-903-504 under Section 8-43-303(1), C.R.S.

2. If the Claimant proved that his condition worsened, whether the Claimant proved, by a preponderance of the evidence, that the right shoulder surgery recommended by Dr. Gersoff is reasonably necessary and causally related to the Claimant's September 14, 2012 admitted work injury.

FINDINGS OF FACT

1. On September 14, 2012 the Claimant sustained an admitted traumatic injury to his right shoulder when, as part of his job duties, he was pushing six to seven shopping carts when they flipped over due to an irregularity in the pavement in the parking lot outside of the retail location operated by Respondent. The Claimant felt immediate pain in his right shoulder and reported the incident to his supervisor immediately (Hearing Tr., p. 27, l. 13 – p. 28, l. 2).

2. After completing a report about the injury, the Claimant was advised to call the nurse hotline. Based on advice from the nurse on the hotline, the Claimant took ibuprofen and iced his shoulder and he waited to see if it would resolve and did not initially request that he be seen by a doctor for his shoulder injury. Subsequent to this the Claimant was terminated from employment on October 15, 2012 for a reason unrelated to his work injury. After his termination, the Claimant asked if he could still see the doctor and was told to see Dr. Beatty (Hearing Tr. p, 28, l. 21 – p. 29, l. 17; p. 45, l. 24 – p. 46, l. 18).

3. The Claimant saw Dr. Brian Beatty on November 12, 2012 and, consistent with his testimony at the hearing, the Claimant reported that "he was pushing in grocery carts. The grocery carts started to fall and when he grabbed them and pulled his right shoulder and he felt a pop with the onset of pain. He thought it would resolve but it has persisted and he is here for evaluation." The injury was diagnosed as a shoulder impingement (Claimant's Exh. 4, p. 5; Respondents' Exh. A). On December 5, 2012, Dr. Beatty referred the Claimant to Wayne Gersoff, MD for evaluation of the right shoulder (Claimant's Exh. 4, p. 9; Respondents' Exh. A).

4. An MRI of the Claimant's right shoulder was performed on November 19, 2012. The findings included mild arthritis and mild subacromial/subdeltoid bursitis, and mild tendinosis. The radiologist specifically noted that there was no rotator cuff tear and no labral tear (Claimant's Exh. 6, p. 25; Respondents' Exh. B).

5. The Claimant saw Dr. Gersoff on December 19, 2012. Dr. Gersoff notes that the Claimant reported continued pain and discomfort in his right shoulder. The examination revealed full range of motion in the shoulder. Upon review of the MRI, Dr. Gersoff opined that there was "rotator cuff tendinopathy without frank tearing or labral disruption." For the right shoulder, the treatment plan was to first try an injection with some home exercises. Dr. Gersoff further noted that if that did not help, the Claimant may, at some point need to have an arthroscopic and subacrominal decompression surgery. Dr. Gersoff noted that the Claimant was to report on his condition in 1 week's time (Claimant's Exh. 5, p. 18; Respondents' Exh.C).

6. The Claimant returned to Dr. Beatty for follow up on January 14, 2013 and Dr. Beatty noted that the Claimant reported that the right shoulder still hurt but that he felt 80-90% better after the injection. At this office visit, Dr. Beatty discharged the Claimant from treatment, found the Claimant at MMI with no impairment and noted no restrictions (Claimant's Exh. 4, pp. 10-12; Respondents' Exh. A).

7. Respondents filed their Final Admission of Liability on January 16, 2013 based on Dr. Beatty's report (Claimant's Exh. 2, p. 2). The position on medical benefits after MMI was a denial of post-MMI medical treatment on the grounds that it is not reasonable, necessary or related to the compensable injury. Per Dr. Beatty's report, there was no impairment and a release to activities without restrictions.

8. The Claimant testified that his symptoms never fully resolved but continued to flare up with activities involving the use of his right arm (Hearing Tr., p. 32, l. 18 – p. 33, l. 7). In the period from January through April of 2013, the Claimant began avoiding activities such as taking his daughters for walks with his dogs because they would yank the leash, or putting things up at the top of the cupboard because it would hurt his arm (Hearing Tr., p. 34). The Claimant chose to not return to work following his termination by Respondent on October 14, 2013 and after reaching MMI until the spring of 2013. During that period of time, from October, 2012 to April, 2013, the Claimant was a stay at home dad caring for his two daughters during the daytime. The Claimant's home activities included taking his children to the playground and lifting his daughters

onto playground equipment. That activity caused Claimant pain and he was forced to avoid such arm motion above his face level. He encountered similar problems when he worked around the house. The ALJ bases these findings of fact and inferences on the Claimant's testimony that,

> Q: Okay. During that period of time -- the period of time from January 14, 2013 up until you started work at King Soopers, would you describe for the judge the symptoms that you were experiencing in your right shoulder and any progression or worsening occurring at that time?
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> A: I would characterize it as positional pain.
>
> Q: What does that mean?
>
> A: I would – you know, if I tried to use my drill, if I was showering, you know, like washing my hair, have my hand above my head, try to take the towel, you know, wipe your back, just taking my daughters to the park and not being able to lift them onto the monkey bars. (unintelligible) both hands.
>
> Q: Okay. You're gesturing to about chest level or face level?
>
> A: No, it was probably face level. Face level.
>
> (Hearing Tr., p. 32, l. 18 – p. 33, l. 12)
>
> .....
>
> Q: (BY MR. HOOK) You were describing the type of symptoms that you were experiencing from January through April 2013. Please continue, if there were further examples of these type of symptoms and what you were feeling.
>
> A: I refrained from taking my daughters for a walk because I have dogs, and if I took the dogs and they'd yank on the leash, it would hurt my arm. Just day-to-day chores, putting things up to the top of the cupboard, things like that.
>
> (Hearing Tr., p. 34, ll. 14-23).

Because of the type of symptoms about which he testified at the hearing, the Claimant avoided using his right arm for overhead work as much as possible, even during some home renovations to get his house ready for sale, leaving overhead work to his wife and a neighbor (Hearing Tr., p. 51, l. 22 – p. 54, l. 23).

9. On April 13, 2013, the Claimant returned to work with a different employer, King Soopers, as a stocking clerk on the night shift. The Claimant testified that he did not work at full duty at King Soopers during the first few weeks at the end of April, 2013 because he was in training (Hearing Tr., p. 38, ll. 5-10). With respect to his stocking duties, he also testified that,

> You know, I could do work on the ground, open up boxes. I could unload the pallet, it would hurt. I would drop things down, you know, because it's above your head, and then you take the box, and you open it up, and you have to stock above your head, face height or all the way to the floor. So, I was having pain when I did top-shelf stuff, height.
>
> (Hearing Tr., p. 37, l. 22 – p. 38, l. 4)

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> …for doing the job at King Soopers, you know, top-shelf kind of stuff. I would – I would go and get a stepladder, so it was like three or four high, so I would be working like I'd be looking down at the shelf, you know, instead of reaching up.
>
> (Hearing Tr., p. 40, ll. 10-15).

From the Claimant's credible testimony (above) about stocking items, the ALJ infers that the Claimant had difficulty performing stocking overhead due to pain so he developed his own work accommodations to avoid having to work overhead and guarded against making movements with his shoulder that would cause pain. Although, the Claimant testified credibly that, even though the job description had requirements of lifting greater than 30 lbs (see Respondents' Exh. I), the Claimant did not actually lift any product or merchandise weighing more than 30 lbs. nor did he lift overhead (Hearing Tr., p. 38, ll. 13-20).

10. The Claimant continued to take precautions during his employment at King Soopers but nevertheless experienced a progressive worsening of his right shoulder injury, so, he testified that he discussed this with Dr. Gersoff, whom he was still treating for his knee injury (Hearing Tr., p. 37, ll. 6 – 15).

11. The Claimant returned to see Dr. Gersoff on May 1, 2013 in what he characterized as a "combined visit" for his knee and shoulder (Hearing Tr., p. 37). At the visit, the Claimant reported that he had a "fairly good result after his last injection" but that he "was continuing to have some discomfort now with some decreased range of motion." Upon examination Dr. Gersoff noted a "fairly good range of motion with discomfort in internal and external rotation with abduction" with "some mild impingement." After the examination Dr. Gersoff concluded that the Claimant's diagnosis was "right shoulder pain due to chronic impingement." Dr. Gersoff provided a second shoulder injection (Claimant Exh. 5, p. 19; Respondents' Exh. C). There is no

mention of the shoulder condition in follow up visits with Dr. Gersoff on May 13, 2013 and June 10, 2013 (Claimant's Exh. 5, pp. 20-21; Respondents' Exh. C).

12. On July 10, 2013, the Claimant had a follow up evaluation for his right knee again with Dr. Gersoff. At this visit, he also reported some discomfort in his shoulder and wanted an injection for both his knee and shoulder. Upon examination, Dr. Gersoff again noted "some mild to moderate impingement." Dr. Gersoff agreed with the Claimant's request for another shoulder injection and performed it and noted the Claimant tolerated the procedure well (Claimant's Exh. 5, p. 22; Respondents' Exh. C).

13. On August 14, 2013, the Claimant and another employee at King Soopers were engaged in horseplay and the Claimant was hit hard enough to knock him to his knee and reported that the left side of his torso was injured. A first report of injury was completed on August 17, 2013 noting that the injury was reported on the day it occurred. The Report also indicates that the employee would seek medical treatment on August 18, 2013 (Respondents' Exhibit I). On August 28, 2013, King Soopers submitted a Notice of Contest denying the claim for an 8/14/2013 injury as not work-related (Respondents' Exhibit I). In the paperwork related to this incident entered into evidence in this case, there is not mention of injury to the right shoulder, just the left side of the Claimant's torso.

14. On September 4, 2013, the Claimant saw Dr. Gersoff for a follow up evaluation specifically for the right shoulder pain. The Claimant reported that the last cortisone injection helped for a very short period of time but that he was back to having pain, discomfort and functional limitations once again. Dr. Gersoff noted the Claimant sought recommendations for treatment. At that time Dr. Gersoff discussed further treatment options of operative versus nonoperative intervention and the Claimant elected to proceed with a right shoulder arthroscopy subacrominal decompression and debridement as indicated (Claimant's Exh. 5, p. 23; Respondents' Exh. C). Dr. Gersoff testified at deposition with reference to the medical note from the September 4, 2013 visit and the decision to proceed with surgery. Dr. Gersoff testified that the surgery option went from being a "consideration" to a "recommendation at the September 4, 2013 visit as the Claimant had tried nonoperative means of treatment, including injections, strengthening exercises and the shoulder had not gotten better and the pain returned after the injections (Depo. Tr., Wayne Gersoff, MD, pp. 13-14). Dr. Gersoff specifically testified that that the surgical recommendation was related to the original injury at Whole Foods (Depo. Tr., Wayne Gersoff, MD, p. 14).

15. The Claimant filed a Petition to Reopen WC Claim #4-903-504 on October 4, 2013.

16. The Claimant saw Dr. Beatty again on October 21, 2013 and Dr. Beatty noted that since he last saw the Claimant, the Claimant had been back to Dr. Gersoff on a couple of occasions for cortisone injections and that the Claimant gets less benefit with the injection each time he gets one. Dr. Beatty opined that, "since it appears his symptoms have been worsening" an MRI with contrast would be scheduled (Claimant's

Exh. 4, pp. 15-17; Respondents' Exh. A).

17. On October 25, 2013, the Claimant underwent another MRI of the right shoulder, this time done with contrast. In the opinion of the radiologist, Dr. David Solsberg, "there is no change since the prior study allowing for differences in technique since November 19, 2012" (Claimants' Exh. 7 p. 26; Respondents' Exh. B).

18. On October 28, 2013, the Claimant saw both Dr. Beatty and Dr. Gersoff. In the morning of October 28, 2013, Dr. Beatty noted that the Claimant reported "ongoing severe pain involving his right shoulder. He has difficulty lifting his arm without significant pain. He states he also lacks strength in the shoulder." Dr. Beatty further noted that "apparently Dr. Gersoff has recommended arthroscopic surgery." Dr. Beatty further noted that "there really appears to be no change in his MRI. The patient wants to reopen his case due to the recommendation by Dr. Gersoff for arthroscopic surgery" (Respondents' Exh. A). In the afternoon on October 28, 2013, Dr. Gersoff opined that, the Claimant had "right shoulder pain due to chronic rotator cuff tendinopathy without labral pathology seen on MRI." Dr. Gersoff further noted that, "his right shoulder has continued to get worse may at some point need to have surgical intervention. He is scheduled to be seen by an independent Worker's Compensation doctor and will follow up after that" (Claimant's Exh. 5, p. 24).

19. On December 17, 2013, the Claimant saw Dr. Rachel L. Basse for an Independent Medical Evaluation. Contrary to Dr. Beatty's medical record dated November 12, 2012, Dr. Basse notes that the Claimant told her he did not recall any "popping" sensation in his shoulder when he was pushing the grocery carts that were falling on 9/12/12. Dr. Basse notes that the Claimant reported that initially his symptoms were not extreme but he would experience activity-related pain. Dr. Basse noted that the Claimant reported limitations due to pain and that he received injections which would help. Dr. Basse also noted that the last injection the Claimant received did not work well, only decreasing symptoms by about 30% and only lasting 1-2 weeks. Dr. Basse reviewed the Claimant's medical records, both prior to and subsequent to the 9/12/12 incident with the shopping carts. Dr. Basse also questioned the Claimant about his work duties at King Soopers and his activities as a stay at home father and considered these in rendering her opinion. Ultimately, Dr. Basse appears to agree that the Claimant has an impingement syndrome and associated tendinitis. However, she finds that it is a degenerative process contributed to by life, leisure, social and vocational activities. She finds that "the single acute work aggravation at [Employer] greater than one year ago appears to have played a more minimal role in his current symptoms." Dr. Basse recommended follow up with Dr. Gersoff for consideration of a repeat injection and consideration of a change in his anti-inflammatory medication, physical therapy, and a psychologic evaluation. She did find that an acute impingement syndrome in the right shoulder was related to the work injury on 9/12/2012, but found that it responded appropriately to conservative treatment. Dr. Basse opined that the right shoulder arthroscopy subacromial decompression and debridement surgery recommended by Dr. Gersoff was not reasonable and necessary to cure and relieve the effects of the 9/12/12 work injury (Respondents' Exh. F).

20. On April 9, 2014, the Claimant met with Gary S. Gutterman, M.D. for a psychiatric consultation for an IME. Dr. Gutterman issued a written report dated April 15, 2014. After reviewing medical records and work records and records from the Mental Health Center of Denver, and two hour meeting with the Claimant, Dr. Gutterman opined that "if it is determined that the patient's anatomic and physiologic findings adequately support a diagnosis of impingement syndrome regardless of the etiology, I believe the patient probably would be a reasonable surgical candidate from a psychiatric perspective. Dr. Gutterman noted that, if the physiologic and anatomic findings support the diagnosis of impingement syndrome, what remained to be determined for the purposes of determining workers' compensation coverage was whether the physical findings supported a finding that the shoulder impingement syndrome was work related as Dr. Gersoff believed or if the impingement syndrome was unrelated to work as Dr. Basse believed (Respondents' Exh. G).

21. In addition to providing opinions in his written medical records, Dr. Gersoff testified by deposition on April 16, 2014. Dr. Gersoff testified that he first saw the Claimant with respect to the right shoulder condition on December 12, 2012 on referral from Dr. Beatty (Depo. Tr., Wayne Gersoff, MD, pp. 5-6). After reviewing an MRI from November 19, 2012 and conducting a physical examination, noting that there was no observable loss of range of motion at that time, Dr. Gersoff recommended a shoulder injection. The Claimant reported a good result from the injection and the effects lasted until approximately May of 2013 (Depo. Tr., Wayne Gersoff, MD, pp. 6-7). By July 10, 2013, Dr. Gersoff testified that the Claimant was feeling discomfort in his shoulder and physical examination demonstrated mild to moderate impingement signs without gross instability (Depo. Tr., Wayne Gersoff, MD, p. 10). By September 4, 2013, Dr. Gersoff testified that the Claimant was complaining of pain and discomfort along with functional limitations and Dr. Gersoff noted loss of range of motion consistent with a positive finding for impingement (Depo. Tr., Wayne Gersoff, MD, p. 11). Dr. Gersoff testified that, at this point he made the definitive recommendation for shoulder surgery since the Claimant had tried conservative treatment and the shoulder was not improved and the symptoms returned (Depo. Tr., Wayne Gersoff, MD, pp. 13-14). Upon reviewing a job description from the Claimant's position at King Soopers, Dr. Gersoff testified that the work "could have been the cause of renewed symptoms, but his prior injury also may have made him more prone to developing this" (Depo. Tr., Wayne Gersoff, MD, p. 19). Dr. Gersoff elaborated later in testimony that the frequency of the job activities at King Soopers would be a factor in determining if the return of symptoms was due to a re-injury. If the Claimant did not lift heavier items repetitively, then the job duties may not be significant. If the Claimant lifted heavier items repetitively every day, then this activity would have more significance (Depo. Tr., Wayne Gersoff, MD, p. 28). In considering other factors for the return of the Claimant's symptoms, and the recommendation for surgery Dr. Gersoff addressed the progression of the Claimant's response to injections as follows:

> The best way to describe that was that the inflammation and irritation in the tissue just was not responding as well to the injection. I think one of

the problems with an injection is everyone feels everyone feels better right after an injection. And the problem is that human nature is they have an injection, feel better, and they kind of say, I feel better, I can do things with my shoulder. And then gradually that wears off. And it's almost like a rebound phenomena where all of a sudden, it takes off and hurts significantly and so forth. And then you try another injection, and it may not respond as well. That's kind of, I think, what happens when you get that diminishing effect, which is why people wind up having surgery, because they are not getting better.

(Depo. Tr., Wayne Gersoff, MD, p. 30).

22. At his deposition, Dr. Gersoff noted a correlation between the increased inflammation, which causes more discomfort and so the shoulder wants to move less and indicated that this explained why before the Claimant had relatively full range of motion with some discomfort and now there is less range of motion due to more irritation, more inflammation and more discomfort (Depo. Tr., Wayne Gersoff, MD, p. 31). Dr. Gersoff also testified that the recommended surgery to the Claimant's right shoulder was and is reasonable and necessary based on objective findings correlating to the diagnosis of impingement (Depo. Tr., Wayne Gersoff, MD, p. 32). Specifically, Dr. Gersoff testified at the hearing as follows:

Q: So having gone through all this, I need to ask the question, Doctor, do you have an opinion on whether or not surgery to the left – to the right shoulder of [the Claimant] at this time would be reasonable and necessary under this workers' compensation case?

A: Yes.

Q: It would be?

A: Yes.

MR. WEINBERGER: I'm going to object to the extent that calls for a legal conclusion. And I'll follow up. It's for the judge to determine whether an aggravation is the cause of the need for surgery.

MR. HOOK: If there was an aggravation.

MR. WEINBERGER: We'll let the testimony go as is. Of course, we haven't taken the lay testimony or anything.

MR. HOOK: I understand the objection.

Q: (BY MR. HOOK) Just to address that, may I briefly ask, are you familiar with those issues as they relate to workers' compensation injuries, based

on your experience and practice?

A: Which issues?

Q: Whether or not something – a procedure is reasonable and necessary.

A: I'm not sure if I'm exactly certain of how workers' compensation defines it.

Q: How would you define it in your understanding?

A: My understanding whether something is reasonable and necessary is that if someone has subjective and objective findings that go along with the diagnosis and they've failed nonoperative treatment – if nonoperative treatment is an option, or if they've failed that – then operative treatment is indicated.

Concerning the Claimant's work at King Soopers, Dr. Gersoff testified that he couldn't say that the Claimant's symptoms in May were the result of his work in that job and that it was hard to say without knowing exactly what and how much he did at King Soopers. Dr. Gersoff pointed out that it would be important to consider the actual extent of the work duties performed by Claimant as opposed to the written job description (Depo. Tr., Wayne Gersoff, MD, p. 36). With respect to his actual work duties, the Claimant later testified at the hearing as follows:

Q: Despite the fact that this job description for your employment at King Soopers indicates that the job could or may require lifting in excess of 30 pounds, did you at any time during that employment lift anything greater than 30 pounds?

A: I don't think so.

MR. HOOK: That's all I have, Your Honor.

MR. WEINBERGER: One follow up.

THE COURT: All right.

RECROSS EXAMINATION BY MR. WEINBERGER

Q: Could you explain how you're able to indicate what weight you didn't lift or not up to 30 pounds.

A: Well, I know –

Q: One second.

-- at King Soopers? Would it be accurate that you didn't weigh the items?

A: No. But it has a label with a weight on it. It has the weight on the box. It has the weight on the product. Dog food has a weight, 5 pounds, 10 pounds, 15 pounds.

Q: Do all products have a weight.

A: Absolutely. Some of it is volume versus –

Q: Okay. That explains why you know the weight of that when picking something up and not the weight of your children when picking things (sic) up. Thank you.

(Hearing Tr., p. 60, l. 13 – p. 61, l. 16).

23. In addition to providing a written report, Dr. Basse also testified by deposition on April 22, 2014. Dr. Basse confirmed that she performed an IME of the Claimant on December 17, 2013 (Depo. Tr., Rachel Basse, MD, pp. 5-6). At the time of the IME, Dr. Basse took a history from the Claimant regarding his activities from January through May of 2013 (Depo. Tr., Rachel Basse, MD, p. 12). Based on activities involved in childcare for his two young children, Dr. Basse understood that the Claimant "would have increased symptoms with some general care activities that involved use of his shoulder. They would hurt him during that activity, but he would generally be okay between the activities" (Depo. Tr., Rachel Basse, MD, pp. 13-15). Dr. Basse specifically testified that,

Q: And what history did he provide you that you deemed to be relevant , or is it everything in your report that you would like to highlight some?

A: Both.

Q: Okay.

A: And I'm specifically looking for the time frame you discussed.

Q: Page 2, I think.

A: Because you were talking up to April?

Q: Yes. So did he give you a history that he had taken time off from work?

A: Yes.

Q: Okay. And that was prior to his working at King Soopers?

A: Correct.

Q: And did he talk about activities in regard to caring for his children?

A: Yes.

Q: Okay. And that was prior to his working at King Soopers?

A: Correct.

Q: And did he talk about his activities in regard to caring for his children?

A: Yes.

Q: How old were his children per his history?

A: At that time, approximately three and six.

Q: Did he describe the kind of things – did he indicate to you that at the time he was being Mr. Mom at home?

A: Yes.

Q: Okay. And did he tell you what he was doing in that capacity during that time period?

A: Yes.

Q: And what was that that he was doing?

A: All the usual activities: cooking, cleaning, laundry, did childcare.

Q: Did he provide a history that he would take his three- or six-yearold to the playground?

A: Yes.

Q: And that, as part of doing so, he would lift them so they could reach the monkey bars?

A: That would be his three-year-old. He would drop the six-year-old off at school and, on the way back, would hit the playground.

Q: And did he tell you whether those – that activity caused him discomfort?

A: Yes. He did tell me.

Q: And what did he – is that what he told you?

A: That he had daily pain that would last an hour or so.

Q: Did he tell you about how he was or what he was doing in March of 2013?

A: Yes. Up till then, he had been more limited. By March he had been able to catch up on his rest and was generally feeling okay. He still had issues, but he was feeling okay. He would have increased symptoms with some general care activites that involved use of his shoulder. They would hurt him during that activity, but he would generally be okay between the activities.

(Hearing Tr., p. 13, l. 1 – p. 15, l. 7)

With respect to work activities during employment at King Soopers starting around April of 2013, Dr. Basse understood from the Claimant that he was doing lighter work, stocking the lower shelves and then using a step stool to reach upper shelves so he wouldn't have to reach overhead (Depo. Tr., Rachel Basse, MD, p. 16). Dr. Basse specifically testified that,

I don't want to give the wrong history as this is an evidentiary deposition. I understood from him that he would do lighter things, not heavy things, and that he had no problems stocking lower shelves with these lighter things, and then he would use a step stool of some kind to reach the upper shelves so he wasn't having to reach overhead.

(Depo. Tr., Rachel Basse, MD, p. 16, ll. 15-21)

Dr. Basse opined that the Claimant immediately experienced symptoms upon these activities and that the activities and movement in his arm required to do his job caused pain (Depo. Tr., Rachel Basse, MD, p. 17). In considering the testimony of Dr. Gersoff that the Claimant's loss of range of motion was due to irritation, Dr. Basse opined that the irritation was due to his activities, including the work at King Soopers and daily activities of his life (Depo. Tr., Rachel Basse, MD, p. 19). Ultimately, Dr. Basse opined that the surgery recommended by Dr. Gersoff is not related to the Claimant's work exposure for Employer, but rather is an elective procedure based on the Claimant's pain levels and functional tolerances and is attributed to the activities that he needs to do that are causing him pain (Depo. Tr., Rachel Basse, MD, p. 20). Dr. Basse testified that she does not believe that the Claimant requires ongoing maintenance care related to the work injury at issue in this case (Depo. Tr., Rachel Basse, MD, p. 20). On cross-examination, Dr. Basse conceded that Dr. Gutterman had ruled out the

psychological aspect of symptom magnification and exaggeration (Depo. Tr., Rachel Basse, MD, pp. 26-27). Dr. Basse also agreed that she was not aware of any specific incident that occurred at King Soopers that caused a re-injury to the Claimant's right shoulder nor was she aware of any such activities outside of his work at King Soopers, testifying,

> Q: Okay. Isn't it true, to your knowledge, there was no specific incident that occurred at King Sooper's involving [the Claimant's] work performance that caused some sort of reinjury to his right shoulder; isn't that correct?
>
> A: Yes.
>
> (Depo. Tr., Rachel Basse, MD, p. 28, ll. 2-7)

Dr. Basse did not agree that the premise that work activities at King Soopers *aggravated* the Claimant's prior work injury, because it is Dr. Basse's opinion that the work injury at Employer "was done" (Depo. Tr., Rachel Basse, MD, p. 31). Dr. Basse did testify that she would agree that the Claimant's right shoulder condition worsened after he was placed at maximum medical improvement in January 2013, including increased pain and a decrease in range of motion by September 2013 (Depo. Tr., Rachel Basse, MD, p. 31). Dr. Basse testified that the surgery proposed by Dr. Gersoff is reasonable for the Claimant's shoulder condition, but she does necessarily find it necessary since she testified that it depends to what extent the Claimant could modify the demands on his shoulder (Depo. Tr., Rachel Basse, MD, p. 36).

24. Based upon the evidence submitted at the hearing, in particular, the persuasive opinion of Dr. Gersoff, coupled with the Claimant's credible testimony regarding his actual work activities at King Soopers, it is found that the Claimant experienced a worsening of the condition of his right shoulder that is related to his work-related injury of September 14, 2012 after being placed at maximum medical improvement on January 14, 2013. The ALJ recognizes that Dr. Basse provided a contrary opinion regarding the source of the worsening of the Claimant's right shoulder symptoms. However, the ALJ resolves the conflict by giving greater weight to the testimony and reports of Dr. Gersoff, when considered in connection with the factual testimony from the Claimant regarding limits to his work activities at King Soopers and other activities that he would refrain from doing relating to childcare and work around the house.

25. The opinion of Dr. Gersoff regarding the recommendation for the right shoulder arthroscopy subacromial decompression and debridement is also found to be credible and persuasive. Based on this opinion and the weighing of all of the evidence presented to the ALJ, the recommended surgery is found to be reasonably necessary to cure and relieve the Claimant from the effects of his September 14, 2012 work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Petition to Reopen

The Claimant filed his Petition to Reopen W.C. 4-903-504 on October 4, 2013 on the ground that his medical condition has worsened. The Claimant initially sustained work injuries on September 14, 2012 when he suffered an injury to his right shoulder

while pushing shopping carts. The Claimant now seeks medical benefits in the nature of a right shoulder arthroscopy subacromial decompression and debridement and other care for a worsening right shoulder condition that the Claimant alleges is causally related to his original admitted work injury.

Section 8-43-303(1), C.R.S., provides that an award may be reopened at any time within six years after the date on the ground of a change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. Reopening is not warranted if once reopened, no additional benefits may be awarded. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

As a threshold matter, the Claimant bears the burden of establishing that change in the Claimant's condition is causally related to the original injury. Section 8-41-301(1)(c), C.R.S.; *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Moreover, medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

In order to prove a causal relationship, it is not necessary to establish that the industrial injury was the *sole* cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial*

Claim Appeals Office, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment, such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *City of Durango v. Dunagan*, *supra*. However, to the extent that the worsening of a condition occurs as the result of an independent intervening cause, then reopening would not be warranted as this is unrelated to the original compensable injury. Whether a particular condition is the result of an independent intervening cause is a question of fact for the ALJ. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002).

The Claimant has established, through his testimony and with the medical evidence, that the relief from right shoulder injections was wearing off by May 1, 2013 and that the periods of relief following the injections were diminishing with the each successive injection. Because that treatment was failing, and the Claimant's symptoms were increasing, Dr. Gersoff felt it reasonable and necessary to proceed with a surgical resolution. A comparison of Claimant's range of motion measurements from his date of MMI with those measured by Dr. Beatty and Dr. Gersoff in October, 2013 demonstrate the worsening of the shoulder condition. Respondents do not challenge the findings and conclusion that the Claimant's right shoulder condition worsened subsequent to attaining MMI in January, 2013.

To the extent that the Respondents offered an intervening cause for the worsening of the Claimant's condition, the Respondents failed to meet the burden to establish the Claimant's subsequent work duties at King Soopers or his childcare activities rose to the level of effective intervening causes severing the causal link between the Claimant's September 14, 2012 injury at Employer and his worsened condition subsequent to MMI. See *Kurtz v. King Soopers*, WC No. 4-648-488 (ICAO March 20, 2008).

Although the Claimant was placed at MMI on January 14, 2013, since that point, the Claimant has proved that his right shoulder condition has deteriorated. The medical opinions of Dr. Gersoff and Dr. Beatty support the Claimant's contention that the Claimant's condition has worsened and that this worsened condition is causally related to the original injury. Because the Claimant has proven by a preponderance of the evidence that his condition has changed and he is entitled to benefits, WC Claim No. 4-903-504 is reopened.

Medical Benefits – Reasonably Necessary

Once a claimant establishes the worsened condition is causally related, the claimant must prove the proposed medical treatment is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Here, Claimant established by a preponderance of the evidence that the specific medical treatment consisting of right shoulder arthroscopy subacrominal decompression and debridement proposed for the Claimant's right shoulder by Dr. Gersoff is reasonably necessary to cure and relieve the effects of the September 14, 2012 industrial injury and the worsened condition from which the Claimant is now suffering. Although Dr. Basse disputes that the need for this surgery is related to the work injury, and disagrees that the surgery is necessary, she agreed that the Claimant is a surgical candidate and the surgery would be reasonable. Having found that the Claimant's condition has worsened since he was placed at MMI on January 14, 2013, it is further determined that the Claimant has proven that the surgery recommended by Dr. Gersoff is reasonably necessary to cure and relieve him from the effects of his work injury. The increased symptoms and decreased range of motion experienced by the Claimant are found to be a foreseeable consequence in this case following the failure of conservative treatment, including injections.

ORDER

It is therefore ordered that:

1. Workers' Compensation claim no. 4-903-504 is reopened.

2. Insurer is liable for the medical care the Claimant receives that is reasonably necessary to cure and relieve him from the effects of the

compensable injury that occurred on September 14, 2012, per his authorized treating physician and any authorized referrals, including, but not limited to, right shoulder arthroscopy subacromial decompression and debridement recommended by Dr. Gersoff.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 26, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-906-908-02

ISSUES

- Whether Respondent has proven by a preponderance of the evidence that Claimant waived his right to a Division Independent Medical Evaluation (DIME).

STIPULATIONS

1. Claimant attempted to schedule the DIME within 50 days as required by statute.

2. Dr. Miller was scheduled to be out of the country during the 50 days in which the DIME needed to take place.

3. The adjuster agreed that Claimant could schedule the DIME outside of the 50 day time limit provided by statute.

4. Claimant has failed to schedule the DIME.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant sustained an admitted injury on December 27, 2012.

2. Claimant was placed at maximum medical improvement (MMI) on September 25, 2013. A Final Admission of Liability was filed on October 3, 2013. It has been more than 1 year since Claimant was placed at MMI.

3. Claimant timely objected to the Final Admission of Liability and requested a DIME.

4. The DIME Unit issued an IME Physician Confirmation on January 9, 2014 identifying Dr. Frederick Miller as the DIME physician and notifying Claimant that the DIME needed to be scheduled within 5 business days from the date of receipt of the IME Physician Confirmation and that the DIME needed to take place within 35 – 50 calendar days of the date the telephone call requesting the DIME appointment was made.

5. Claimant was unable to schedule the DIME to occur within 50 calendar days because Dr. Miller was going to be out of the country.

6. Lisa Biggs, the adjuster for the third party administrator handling this claim, agreed that Claimant could schedule the DIME to occur outside of the 50 day period. Claimant argues Ms. Biggs' agreement indefinitely extends his time to schedule the DIME. The ALJ disagrees with Respondent's contention and reasonably infers from the evidence that Ms. Biggs' agreement that the DIME could be scheduled to occur outside of the 50 day period was made to accommodate Dr. Miller's international travel schedule; not to indefinitely extend the scheduling or occurrence of the DIME.

7. In his position statement, Claimant seeks to excuse his failure to schedule the DIME by arguing trial strategy, a failed attempt to settle the claim, and assigning responsibility for the failure to Respondents. No evidence was offered at hearing to support these arguments and the ALJ finds they are without merit.

8. The DIME was not scheduled within 5 business days from the date of receipt of the IME Physician Confirmation even after Respondent agreed that the DIME could take place outside of the 35 - 50 calendar day timeframe.

9. Claimant testified at hearing that he did not know if his DIME had ever been scheduled and that he did not know whether or not he was notified of an appointment with Dr. Miller. It has been 11 months since the IME Physician Confirmation was issued. The ALJ finds that to date, no DIME has been scheduled.

10. On August 6, 2014 Respondent notified the Division of its intent to request cancellation of the DIME pursuant to Rule 11-3(I), WCRP and filed an Opposed Request for Cancellation of DIME and Motion to Strike Notice and Proposal.

11. The ALJ finds that Claimant, through his inaction in setting a DIME for nearly 1 year, has waived his right to a DIME. The period of time for the DIME to occur is provided by rule to further the legislative intent of providing the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The period of time for the DIME to occur is also provided by rule to further the legislative intent that impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. By failing to schedule a DIME for almost 1 year since the parties were notified of the selection of a DIME physician, Claimant frustrates the express legislative intent of the Workers' Compensation Act, unconscionably delays the statutory remedy available to him to have his claim reviewed by a DIME physician, and prejudices the Respondent's right to have Claimant's permanent medical impairment determined at or near the time Claimant was placed at MMI. Claimant, through his attorney, knew that a DIME needed to be scheduled within 5 business days of the date of receipt of the IME Physician Confirmation. The adjuster agreed that the DIME could occur outside of the 35 – 50 day time period provided by Rule. Despite this agreement, Claimant never scheduled the DIME. Claimant's failure to schedule a DIME for nearly 1 year is inconsistent with the assertion of his right to a DIME, manifests his intent not to pursue a DIME, and constitutes a waiver of that right.

12. The ALJ finds Respondent has proven by a preponderance of the evidence that Claimant waived his right to a DIME.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. A preponderance of the evidence is evidence which leads the trier-of fact, after conserving all of the evidence, to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). Facts in a workers' compensation case are not interpreted liberally in

favor of either the injured worker or the employer. C.R.S. §8-43-201. The party asserting waiver carries the burden of proof. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988); *Sholund v. Argenbright Security*, W.C. No. 4-415-403 (June 16, 2004).

Permanent medical impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. As found, it has been more than 1 year since Claimant was placed at MMI.

Rule 11-2(A), W.C.R.P. provides, in relevant part, that *unless otherwise approved by both parties*, the DIME shall occur within 35 – 50 days from the telephone call requesting an appointment. Emphasis added. As stipulated by the parties, the adjuster agreed that the DIME could occur outside of the 35 – 50 day window because Dr. Miller was unable to perform the DIME within the 35 – 50 day window. As found, despite the adjuster's agreement that the DIME could occur outside the 35 – 50 day window, her agreement was not intended to indefinitely extend the time within which Claimant was to schedule the DIME. Claimant has not scheduled the DIME.

Rule 11-3(I), W.C.R.P. provides, in relevant part, that the date of the DIME shall be set in accordance with Rule 11-2(A) and that "[t]he requesting party shall call the IME physician within five (5) business days after providing and/or receiving notice of the final IME physician selection to schedule the examination, and shall immediately notify the Division and the opposing party by telephone, and confirm in writing, the date and time of the examination. Absent good cause as determined by the Director or an administrative law judge, failure to make the appointment and advise all parties within five (5) business days permits the opposing party, after notifying the Division of such failure, to either schedule the IME appointment or to request cancellation of the IME." As found, not only did Claimant fail to schedule the DIME within 5 business days of receipt of the January 9, 2014 IME Physician Confirmation but Claimant has failed to schedule the DIME at all.

Waiver is the intentional relinquishment of a known right. *Johnson, supra*. The exercise of a statutory right is always subject to equitable limitations. *Id.* Waiver may be implied as when a party engages in conduct which manifests an intention to relinquish the right or acts inconsistently with its assertion. *Id.; see also, Munoz v. JBS Swift & Company*, W.C. No. 4-780-871 (March 1, 2010); *Rodriguez v. Safeway Stores, Inc.*, W.C. No. 4-712-019 (June 3, 2009). A party may, through inaction, delay, or other similar conduct, waive the right to obtain a DIME. *Johnson, supra.; Munoz, supra.* Parties to a workers' compensation claim are presumed to know the applicable law. *Midget Consol. Gold Mining Co. v. Industrial Commission*, 193 P. 493 (Colo. 1920); *Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981). A party may not use ignorance of the law as a defense to its legal duties. *Grant v. Professional Contract Services*, W.C. No. 4-531-613 (January 24, 2005).

As found, Claimant, through his inaction in setting a DIME for nearly 1 year, has waived his right to a DIME. The period of time for the DIME to occur is provided by rule to further the legislative intent of providing the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The period of time for the DIME to occur is also provided by rule

to further the legislative intent that impairment is to be determined at the time of MMI. §8-42-107(8)(c), C.R.S. By failing to schedule a DIME for almost 1 year since the parties were notified of the selection of a DIME physician, Claimant frustrates the express legislative intent of the Workers' Compensation Act, unconscionably delays the statutory remedy available to him to have his claim reviewed by a DIME physician, and prejudices the Respondent's right to have Claimant's permanent medical impairment determined at or near the time Claimant was placed at MMI. Claimant, through his attorney, knew that a DIME needed to be scheduled within 5 business days of the date of receipt of the IME Physician Confirmation. The adjuster agreed that the DIME could occur outside of the 35 – 50 day time period provided by Rule. Despite this agreement, Claimant never scheduled the DIME. Claimant's failure to schedule a DIME for nearly 1 year is inconsistent with the assertion of his right to a DIME, manifests his intent not to pursue a DIME, and constitutes a waiver of that right.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has waived his right to a DIME. Claimant's October 4, 2013 Notice and Proposal to Select an Independent Medical Examiner is hereby stricken.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 9, 2015

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable work injury on December 15, 2012.

2. If the Claimant proved he sustained a compensable injury on December 15, 2012, whether the Claimant proved he is entitled to temporary disability benefits related to the December 15, 2012 injury.

3. If the Claimant proved he sustained a compensable injury on December 15, 2012, whether the Claimant proved that the medical treatment he received was reasonable and necessary to cure and relieve the Claimant from the effects of the December 15, 2012 injury.

4. Whether the Claimant proved, by a preponderance of the evidence, that he suffered a compensable work injury on January 10, 2013.

5. If the Claimant proved he sustained a compensable injury on January 10, 2013, whether the Claimant proved he is entitled to temporary disability benefits related to the January 10, 2013 injury.

6. If the Claimant proved he sustained a compensable injury on January 10, 2013, whether the Claimant proved that the medical treatment he received was reasonable and necessary to cure and relieve the Claimant from the effects of the January 10, 2013 injury.

7. If the Claimant is entitled to any temporary disability benefits, the calculation of the Claimant's average weekly wage.

8. If the Claimant has established that he is entitled to receive temporary disability benefits, have Respondents proven that the Claimant was terminated for cause.

9. If the Claimant is entitled to any temporary disability benefits, determination of any offsets for unemployment benefits.

FINDINGS OF FACT

1. The Claimant is a 54-year old man who worked for Employer as an extra board line haul truck driver starting on May 30, 2012.

Claimant's Prior Medical History

2. The Claimant reported some prior medical history to Dr. Lawrence Lesnak: a right knee arthroscopy in approximately 1985, three separate right ankle surgeries due to a work related injury in the early-mid 1990's; a left shoulder arthroscopy due to a work related injury in the mid-1990s; dental treatment for a 2009 incident when his four bottom teeth were knocked out and a January 25, 2010 injury to his left shoulder and low back. (Claimant's Exhibit 17; Respondents' Exhibit A, pp. 3-4).

3. On July 12, 2003, the Claimant underwent an MRI of the lumbar spine for complaints of low back pain. The findings were generally indicative of degenerative changes from L1 through S1 (Claimant's Exhibit 12).

4. On January 22, 2006, the Claimant presented to HealthOne North Suburban Medical Center complaining of injuries from an assault. The Claimant reported he was assaulted at a bar when several bouncers jumped him. He is unsure whether he lost consciousness or not. He reported that he was hit in the head and complained of neck pain, right shoulder pain, back pain and left knee pain. A CT scan of the Claimant's head was negative and a CT scan of his cervical spine was unremarkable (Respondents' Exhibit B, pp. 34-35).

5. On January 22, 2010, the Claimant slipped and fell at work. At the time, the Claimant was a truck driver and he reported that he was up on his semi and then found himself on the ground. "He states he may or may not have passed out. He does not know. He found himself on the ground after falling forward." The Claimant reported pain to the top of the head and to the cervical spine. His left shoulder was painful and difficult to move secondary to pain. He also reported lumbar spine pain and tingling into the coccyx. On January 27, 2010 the Claimant had stomach "gurgling" and had blood in his stool so he was sent to see Dr. Caroline Gellrick who further referred his that day to Exempla Lutheran for evaluation as to his shoulder (Respondents' Exhibit H, p.114). The Claimant was evaluated again on January 28, 2010 by Dr. Caroline Gellrick. The Claimant's shoulder was not dislocated but he still had left shoulder pain, back pain, tailbone pain and a headache (Claimant's Exhibit 9; Respondents' Exhibit H, p. 111).

6. The Claimant testified that he has had a history of going unconscious. However, he disputed that he had a history of passing out for no known reason. Prior instances he recalled, in 2001 and January of 2010, were due to ice or snow (Hearing Tr., p. 105).

Claimant's Documented Performance Issues Coincide with His Alleged Injuries

7. The Claimant has a history of performance issues which were significant and documented in his employment file which occurred right before the alleged work injuries.

8. On August 2, 2012, the Claimant was given a written warning for "unacceptable behavior, insubordination" and "violation of Company Policy or Work Standards," arising out of an alleged altercation between the claimant and another employee (Respondents' Exhibit J, pp. 174-177).

9. On November 14, 2012, the Claimant was provided a written warning for a "violation of Company Policy or Work Standards" arising out of his failure to timely get medically cleared to drive due to blurred vision. The Claimant was off from work November 6-14, 2012 (Respondents' Exhibit J p. 172 and 206).

10. On November 27, 2012, the Claimant was given a citation for a Department of Transportation ("DOT") vehicle inspection resulting in a left lane violation (Respondents' Exhibit J, p. 203).

11. On December 15, 2012, the Claimant was given a written warning for "poor performance" by Jason Gilbert, Inbound Supervisor, for failing to timely deliver freight from Salt Lake City to Denver. This violation occurred on the same date that the first of the alleged work injuries in this case occurred per the Claimant's testimony (Respondents' Exhibit J, p. 171).

12. On December 21, 2012, the Claimant was given a written warning for "poor performance" arising out of an inability to meet company standard run times (the expected time for a run to last). This performance issue occurred right at the time that the Claimant reported the first alleged work injury (Respondents' Exhibit J, p. 163 and 201). The Claimant disputed this written notice in the comments that he prepared and signed on December 21, 2012 and claims that this was a "witch hunt" to try to eliminate a good employee because he asked for a larger tractor to fit his body. The Claimant also argued that he was not provided with proper tools to meet his expected run times such as maps and good directions to a terminal (Respondents' Exhibit J, pp. 163-164 and 201-202).

Claimant's Employment with Employer and Two Reported Injuries

13. The Claimant is seven feet tall and testified that at the end of 2012, he weighed about 263 pounds (Hearing Tr., p. 31). The Claimant's duties while working for the Employer included driving a truck, pulling doubles and triples, hooking and breaking the sets of trailers, lifting up to 150 pounds (Hearing Tr., p. 32). The Claimant would typically drive long haul routes to destinations in other states and then continue with the next route he was dispatched or wait at the destination until he was dispatched to another destination (Hearing Tr., p. 33).

14. The Employer usually paid the Claimant by the mile, but was occasionally paid by the hour if they were working locally or when the vehicle broke down. The Claimant received a health insurance benefit and was provided with hotel accommodations on overnight drives (Hearing Tr., pp. 35-36). The Claimant testified that he would make an average of $1,100.00 - $1,500.00 per week (Hearing Tr., p. 35)

but that after October 26, 2012 his earnings dropped off considerably because he believed the Employer was limiting the hours on his schedule and not giving him as many routes as he was being more proactive about trying to get a larger truck to drive due to his body frame (Hearing Tr., pp. 36-37). The Claimant testified that between October 26, 2012 and December 14, 2013, the Claimant was at the same time requesting a larger cab to drive for longer distance drives. At the same time, he testified, he was not getting as many routes as he was accustomed to being scheduled even though he was requesting full time work (Hearing Tr., pp. 36-38).

15. The Claimant testified that he was usually assigned a day cab instead of the larger sleeper cab. When he was in the smaller cab his legs would be cramped and get tired and he had to adjust the seat to its highest position to accommodate his legs. However, the Claimant testified that when he adjusted the seat to that position, this put his head right up to the top of the cab (Hearing Tr., p. 38-40). Based on the accommodation request made by the Claimant, the Claimant was evaluated by Dr. Jonathan Block to determine fitness for duty due to the Claimant's complaint that he was having trouble fitting into his truck due to his height (Hearing Tr., p. 44). Dr. Bloch saw the Claimant for evaluation on November 27, 2012 and noted that the Claimant advised him that he was having trouble fitting into his truck. Dr. Bloch noted that the Claimant advised that he seemed to do better in a sleeper truck since he could adjust the seat back instead of just up and down. Dr. Bloch also noted that the Claimant reported that his back was starting to become sore from working in cramped trucks. Dr. Bloch recommended truck manuals be reviewed to see if there is a truck better designed/suited for a man of the Claimant's height, and if so if there are any appropriate reasonable accommodations (Claimant's Exhibit 6; Respondents' Exhibit D, pp. 54-56). The Claimant testified that he did not tell Dr. Bloch at that evaluation that he had problems with his neck or lower back (Hearing Tr., p. 42).

16. The Claimant's inbound supervisor, Jason Gilbert, gave the Claimant a Notice of Written Warning dated December 15, 2012. The written notice describes the misconduct as poor performance for a late delivery. Mr. Gilbert noted that "on 12/14/12 [the Claimant was] dispatched from Salt Lake City to Denver at 22:00 PM, due to arrive in Denver at 07:57 AM, according to the computer system. At approx 10AM I called you and found you had just reached Laramie WY which is 142 miles from the terminal…" (Respondent's Exhibit J, p. 171). At his deposition, Mr. Jason Gilbert testified he previously held the position of inbound supervisor although he is currently the outbound supervisor (Depo. Tr. Jason Gilbert, p. 5). Mr. Gilbert confirmed that the date of the Claimant's write up for lateness was December 15, 2012 (Depo. Tr. Jason Gilbert, p. 7)

Claimant's Alleged December 15, 2012 Injury

17. The Claimant testified that he was first injured while working for Employer on December 15, 2012. The Claimant testified that he was assigned to drive a route to and from Salt Lake City and he was on his way back, driving eastbound on I-80. As he was driving back, there was a blizzard and the overhead road signs were recommended reduced speeds, so the Claimant took longer than usual to get back (Hearing Tr., pp.

45-46). The Claimant testified that as he was approaching Laramie, there was quite a bit of snow on the road although the storm had passed. At this point he testified that he was back up to driving full speed when he hit a berm of snow in the road that he didn't see. He testified that as he hit the berm at a pretty high rate of speed he felt his seat go blat to the floor, squeeze down and the shoot back up. The Claimant's head hit the ceiling and he testified that in the process it jammed his neck up too. The Claimant testified that almost immediately he had an immense headache and pain in the top of his head, back of his neck, the upper trapezius areas and his shoulders and he it was hard to turn his head to either side (Hearing Tr., p. 47). The Claimant testified that he continued to drive the route but it took longer due to the previous weather and his injury. When he returned to Employer's terminal no one was there except for one security guard (Hearing Tr., p. 48).

18. The Claimant testified that supervisors are not at the terminal on Saturday afternoons, which is when he returned after his injury, and they are not there on Sundays. So, he reported his injury to his immediate supervisor Marty Kessler by phone on Monday morning since he didn't have a home number to call Mr. Kessler over the weekend. The Claimant testified that when he called he told Mr. Kessler that he injured himself when he hit a bump in the road and he jammed his neck. The Claimant testified that he asked if he could go to the doctor and Mr. Kessler told him he would get back to him (Hearing Tr., p. 49). The Claimant did not hear from the Employer until Wednesday when the dispatcher called him to do a run. He testified that was off on Monday and Tuesday and testified that he did not seek medical care on those days on his own because he was having financial issues and did not want to incur doctor bills that he couldn't afford to pay (Hearing Tr., pp. 50-51). However, the Claimant later testified that he did work on Monday, December 17th when he drove a local run to Grand Junction (Hearing Tr., p. 56). The Claimant testified that he requested medical care again and had a meeting with his supervisor Marty Kessler and the terminal manager Leo Raker on December 20, 2012 and they told the Claimant that if he was going to get medical care he had to go right away (Hearing Tr., pp. 51-52). On cross-examination, the Claimant's testimony becomes somewhat convoluted about when the injury was reported. The Claimant does insist that he always reported an injury occurring on December 15, 2012 (Hearing Tr., pp. 113-114), however, the supervisor investigation report for an employee injury completed by Marty Kessler states that the Claimant advised him on 12-21-12 that he needed to see a doctor for neck pain due to an injury that happened while driving from terminal 224 to 257 on I-70 near Grand Junction (see Respondents' Exhibit J, p. 197). The Employer's First Report of Injury form also indicates the injury date was 12-20-12 but there is a question mark next to it. It is noted that the injury was reported to management on 12-21-12. The injury was describe as happening when the Claimant was driving a day cab where the Claimant had the seat all the way up and when the tractor hit a dip he injured his head, neck and upper back. The report indicates he was on I-70 eastbound when the Claimant hit the dip in the road. The Claimant signed that he would go to Concentra on 12-21-12. The Claimant's signature is at the bottom of the form with the date of 12-21-12 (Respondents' Exhibit J, p. 193). Later on re-cross examination, the Claimant testified that although the signature on the bottom of the page is his and some of the handwriting on the form is his, some of

it is not his. Specifically, he did not write in the information at lines 1-6, someone else did, although the Claimant testifies that he wrote the question mark next to line 1. The Claimant testified that he does not know if he checked the box in line 7. The Claimant testified that he did write on lines 8, 10, 11, 12 a, b and c, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25. Just below line 25, the Claimant testified he did not write in the "check yes" and the 12-21-12 date and did not write Concentra. Then the printed name, signature, last 4 digits of his Social Security number and the date of 21 Dec 2012 was written by the Claimant (Hearing Tr., pp. 199-206).

19. There was testimony at the hearing and a note from Concentra that the Claimant was sent for a random drug screen. The record indicates the drug screen time in was 1:00 PM and the time out was 1:54 PM (Respondents' Exhibit J, p. 200). Based on the testimony and the later medical record from the same day, it appears that on December 21, 2012, the Claimant first was sent for a random drug screen, then came back to the Employer's property and had discussions with his supervisor and filled out paperwork for the injury that the Claimant insists occurred on December 15, 2012 but paperwork notes occurred on December 20, 2012. Then, the Claimant was sent back to the Concentra clinic for medical evaluation and treatment.

20. The Claimant went to Concentra on December 21, 2012 and saw Glenn Peterson, PA. The medical note indicates that the Claimant's time in to the clinic was 5:20 PM and his time out was 7:10 PM. Mr. Peterson noted that the Claimant reported that on December 15, he was driving to his farm and hit the bottom bumps while driving his cab near the speed limit and bumped his head up against the top of the cab. This happened several time resulting in neck pain. The Claimant reported no loss of consciousness but stated that since the incident, he has had a couple of episodes of blurred vision. The Claimant reported that it hurt to turn his head and he did not feel safe driving a big rig cab. PA Peterson assessed the Claimant with a closed head injury, a cervical strain and a thoracic strain. The Claimant was restricted from commercial driving, provided lifting restrictions, prescribed diclofenac and sent to physical therapy (Claimant's Exhibit 6; Respondents' Exhibit D, pp. 48-50). At the hearing, the Claimant testified that he was not driving to his farm at the time he was injured (Hearing Tr., p. 53).

21. The Claimant testified that after his 12/21/2012 appointment, he could not perform commercial driving and that he went to Concentra for physical therapy (Hearing Tr., pp. 57-58). The Claimant was given modified duty sweeping on the dock and his wages were reduced to $10 per hour. The Claimant testified that he performed the modified duty for a short time but he found it dangerous due to the cold and having to dart in between forklifts (Hearing Tr., pp. 60-61).

22. On January 2, 2013, the Claimant was reevaluated by PA Peterson when he came in as a walk-in appointment. The Claimant reported that he was working in a cold warehouse sweeping and his condition was worsening, with his neck tight and difficulty turning to the side with pain down the left arm with certain neck movements. The Claimant's work restriction of no commercial driving was continued as was the

lifting restriction and an additional restriction of no work in a cold environment was added (Claimant's Exhibit 6; Respondents' Exhibit D, pp. 46-47). The Claimant testified that after January 2, 2013, he no longer worked in a cold environment. He returned to work a couple of days later counting vehicles leaving the yard. He performed this duty for four or five days. His neck was painful at this point but he had only been to one physical therapy visit which helped because, he testified, the Employer was making it as hard as possible for the Claimant to schedule visits due to the hours they were scheduling him for work (Hearing Tr., pp. 62-63).

23. The Claimant was reevaluated on January 8, 2013 by Dr. Bloch who noted this was an "odd case" because the Claimant "was originally seen November 27 for evaluation of fit for duty vs. ADA as he is 7 [sic] tall and truck don't accommodate people that tall, he was then complaining of low back pain mostly from having to hunch into the regular sized cab" and "the then returned to check in for UC on 12/20 with added neck pain from having cramping into the cabs that also cause head to rub on top of cab" and "then he presented 12/21 for a specific injury that occurred on December 20th when he says he was driving the speed limit in his truck…he apparently specifically hit his head on the top of the cab while driving en route back from SLC and is now having said complaints." Dr. Bloch assessed the Claimant with cervical strain with subjective radiculopathy, subjective hip pain, subjective thoracic pain and PMH lumbar injury with IR and PWR. Dr. Bloch noted that he reviewed the Claimant's job functions and he did not find restrictions to activity necessary. He did note that a larger truck would be a reasonable accommodation for the Claimant and the Claimant was returned to regular duty. Dr. Bloch considered an MRI but noted that he did not see a "strong indication" due to a physical examination that was "more of an arthritic exam" and the "lack of objective neuritis" along with a "questionable history of actual traumatic injury" (Claimant's Exhibit 6; Respondents' Exhibit D, pp. 42-44).

24. On January 10, 2013, Dr. Bloch made an appended note to his January 8, 2013 medical note stating that,

> [the Claimant] is an incredibly difficult patient to treat. He incisively calls the clinic, at least 4 times today spending over an hour of our staffs time on the phone. He insists there are miscommunication [sic] that he wants to resolve, when there are none. He admits to recording these phone conversations. He has been offered ASAP appointments to come in and discuss with myself but refuses to schedule anything. He often just walks into the clinic instead….He often ends these phone conversations emotionally labile, angry and yelling….most of my staff expressed discomfort about having to work with him and they are requesting not to work with him. I personally fear him but am willing to see him. He made sexual advances at one of our colleagues. He wants to come to therapy 3x a week instead of the 2x per week that was ordered and is standard, but again won't come in for a doctor's visit to discuss….He insists he cannot come to therapy during our regularly scheduled hours, our head therapist Chris made arrangements to come in early, at 7:30 one morning,

to accommodate [the Claimant] and [the Claimant] did not arrive until after 8am.

At the hearing, the Claimant testified that he did not make sexual advances to one of his colleagues and he took issue with Dr. Bloch's statement that he feared the Claimant. The Claimant also denies that he was angry, yelling and emotional during phone conversations with staff. He testified that he did record every one of his conversations with them. The Claimant denied that he was offered meetings with Dr. Bloch that he refused and denied that he would walk into the clinic demanding to be seen. The Claimant testified that he thinks Dr. Bloch wrote his appended note because of a conflict of personality and because they just don't get along (Hearing Tr., pp. 64-66).

25. The Claimant testified that he was not able to return to work after the January 10, 2013 incident. The Claimant testified that he had a referral from the physician at North Suburban Medical Center to see his workers' compensation doctor on January 14th, but Dr. Bloch refused to see him (Hearing Tr., pp. 88-89).

26. A progress note from Dr. Bloch's office notes, "this claim was denied for reasons unbeknownst to me. Patient is as MMI today without any impairment. Patient has no permanent restrictions and is released to full duty activities today. No medical maintenance should be considered neccisary [sic]. A larger cab form [sic] one they may have vacant in their lot, to fit a larger person, is a reasonable accommodation. Case closure has been accomplished. Patient is released from care today"(Claimant's Exhibit 6; Respondents' Exhibit D, p. 41).

27 The Claimant testified that he went to Dr. Bloch's office on January 14, 2013 and was in the waiting room but he did not get to see Dr. Bloch (Hearing Tr., p. 91).

28. Respondents filed a Notice of Contest for WC claim # 4908381 for a date of injury of 12/20/2012 (Claimant's Exhibit 2).

29. The Claimant testified that he did not seek any medical care with his own providers related to the December 15, 2012 or January 10, 2013 incidents because he did not want to incur more bills that he could not afford to pay. The Claimant testified that he wants medical care for migraine headaches, neck pain and blurred vision (Hearing Tr., p. 93).

30. Dr. Lawrence Lesnak, who had performed an evaluation of the Claimant on March 25, 2014, testified that there were no objective findings with regard to the December 2012 alleged incident. He specifically opined that there was no medical evidence that the Claimant sustained any type of trauma to his neck in December 2012. (Hearing Tr., pp. 216-217). He later clarified: "What I'm saying is whatever happened [in December 2012], even if it did happen, it did not leave any signs of trauma or abnormalities [or] hazards out of that potential incident." (Hearing Tr., p. 234).

31. In considering the totality of the evidence presented, the ALJ credits Dr. Lesnak's opinions along with the supporting medical records and determines that the Claimant has not established that it is more likely than not that he sustained a compensable injury in December 2012 that resulted in the need for medical treatment. The ALJ finds that the objective medical evidence does not support that an injury occurred on December 15 or December 20, 2012. Additionally, the timing of the reporting of this injury is suspect based on the employment documents in evidence. Moreover, there is considerable inconsistency related to the Claimant's testimony, statements and documents in evidence and the Claimant's actions during the time frame from December 15, 2012 to December 21, 2012. Overall, the Claimant's testimony is not found to be credible in the face of more credible and reliable evidence that was presented in this case with respect to the allegations of a December 15, 2012 injury.

32. In the alternative, if there was any injury, the December 2012 incident did not result in the need for permanent impairment or medical care. As noted above, the Claimant was released to MMI with no permanent impairment on January 16, 2013, after just three evaluations. Any effects of the alleged incident were resolved as of that date (Respondents' Exhibit D, p. 40). Dr. Lesnak testified that he agreed that the Claimant did not sustain any permanent impairment as a result of the alleged December 2012 event. Specifically, he testified that there were no objective findings on which a physician could base any need for permanent impairment or medical treatment (Hearing Tr., p. 218). Further, The ALJ credits the medical records and the opinions of Dr. Lesnak and finds that Claimant has not proven that it is more likely than not that the claimant has demonstrated a need for medical treatment as a result of the December 2012 alleged injury. The ALJ determines that the Claimant has failed to establish that the medical care rendered in December 2012 and early January 2013 was reasonable and necessary medical treatment related to a compensable injury.

Claimant's Alleged January 10, 2013 Injury

33. The Claimant testified that on January 9, 2013 at about 9:30 at night he was called in by the dispatcher to do a run to Salt Lake City. He testified that he "felt pressured" by the Employer because they offered him a larger truck and said that he had to get on the road and that he was their best driver. The Claimant further testified that there is a company rule that whenever a driver is called, they have 2 hours from that time to get ready from their house and drive into work (Hearing Tr., pp. 66-67).

34. The Claimant testified that he reported to work on January 9, 2013 at approximately 11:30pm but that he suffered an injury as he was in the process of reporting. The Claimant testified that he was taking some essential items from his personal vehicle which was in the parking lot next to where the tractors are parked. The Claimant testified that he tripped and fell and hit his head on some steps and landed to the side of the steps in the dirt. The Claimant offered photograph which were entered into evidence as Exhibits 19, 20 and 21 to depict the stairs and the area where he

testified he fell (Hearing Tr., pp. 67-78 and Claimant's Exhibits 19, 20 and 21). As the Claimant was carrying items from his vehicle to the tractor he would be driving, he testified that he recalled feeling dizzy and lightheaded and as he felt his legs become weak he stumbled and hit one of the steps and fell forward. He testified that because he was carrying things, he didn't brace and he recalls falling face down in the dirt immediately to the left of the steps (Hearing Tr., p. 80). After this, the Claimant testified, he blacked out and does not have recollection after going unconscious until he woke up in the emergency room. He specifically testified that he does not recall the ambulance ride to the hospital (Hearing Tr., pp. 84-85).

35. Mr. Mark W. Passamaneck, a professional engineer working primarily in forensic engineering and analysis for twenty years, testified as an expert in the area of forensic engineering. Mr. Passamaneck was asked to comment on the location of the Claimant's body, found to the left of the stairs as indicated in witness statements and testimony in relation to the Claimant's testimony that he tripped as he was walking up the stairs. Mr. Passamanek opined that the Claimant's testimony does not make sense from a forensic engineering perspective because if the Claimant was walking up the stairs and he tripped and fell, he would have fallen onto the stairs. If the Claimant had attempted to guard against the fall, the Claimant's upper body would be further off the axis of the stairs in comparison to his feet but a drawing prepared by Jason Gilbert regarding the Claimant's body position in relation to the stairs shows the upper body closer to the stairs and the feet further away (Hearing Tr., pp. 272-273; Respondents' Exhibit J, p. 185). Mr. Passamaneck also noted that the medical information and statements that he read indicate that the Claimant did not suffer cuts or abrasions consistent with falling on cement stairs (Hearing Tr., p. 273). Mr. Passamaneck testified that there was nothing unusual in the area where the Claimant was reported to be found unconscious that would have caused a fall, it was just a gently sloping dirt hill (Hearing Tr., p. 273-274). On cross-examination, Mr. Passamaneck conceded that he did not know if there had been snow or ice on the stairs on the night when the Claimant was found unconscious (Hearing Tr., p. 276).

36. Jason Youmans was a shift coordinator/Class A mechanic in January of 2013. He no longer works for Employer and has worked elsewhere since about December 2013. However, Mr. Youmans was working for Employer the night of January 9, 2013 into the morning of January 10, 2013. Mr. Youmans testified that he was sitting in the office at the shop building taking care of paperwork when the Claimant came in and said, "I need you to call dispatch and tell them I've been here since 11:20." Mr. Youmans testified that he looked at the clock and saw that it was after midnight and he told the Claimant "I can't do that. I'm not going to lie to the company for you. I have no idea how long you've been here." Mr. Youmans testified that the Claimant next complained about not being able to find a particular truck and said that he's been walking around all night trying to find it. Mr. Youmans testified that he told the Claimant that the truck he was looking for was right out front parked along the side of the building they were in. Mr. Youmans testified that the Claimant didn't respond to that and kept talking about how much he disliked the Employer and that they were mean to him and Mr. Youmans testified that he asked the Claimant what was going on, but he didn't

respond to that either. So, Mr. Youmans suggested that if the Claimant was in trouble, the best thing to do was to get the tractor and go to work. Mr. Youmans testified that after a few seconds the Claimant turned around, said okay, and walked out. Mr. Youmans testified that he was concerned about the Claimant's behavior since he wasn't responding to anything Mr. Youmans had said and he didn't look normal; he looked pale and like he was getting sick (Hearing Tr., pp. 292-294). Mr. Youmans generally testified in accordance with the written statement that he had prepared contemporaneous with the events of January 9, 2013 – January 10, 2013 (Respondents' Exhibit J, p. 187A).

37. The Claimant testified in rebuttal that Mr. Youmans was lying and that the Claimant never asked him to lie about saying the Claimant had arrived at 11:20. The Claimant testified that he did have a discussion with Mr. Youmans about trying to find his tractor. The Claimant also disputes that he was complaining about Employer and that he didn't like the company (Depo. Tr. Claimant, pp. 4-6).

38. The Claimant's inbound supervisor, Jason Gilbert, was alerted after he had just arrived at work that the Claimant was found on the ground by the parking lot. Mr. Gilbert testified that he saw the Claimant lying on his stomach, face down, with his arms above his head facing towards the parking lot and up the hill next to the stairs (Depo. Tr. Jason Gilbert, pp. 8-9). Mr. Gilbert prepared a report into the investigation of the injury on January 10, 2013, noting that the time of injury was 12:40 AM. Mr. Gilbert obtained statements from other individuals and prepared his own statement as well (Respondents' Exhibit J, pp. 181-187a). Mr. Gilbert testified that there was no snow or ice at the time of the January 10, 2013 incident. He further testified that there was no blood or abrasions that he could see on the Claimant's face or hands and there was no blood on the stairs (Depo. Tr. Jason Gilbert, pp. 13-14). Although, Mr. Gilbert later conceded that it was night, there was no lighting on the stairs and he did not have a flashlight while examining the Claimant or the area (Depo. Tr. Jason Gilbert, pp. 33-34 and p. 45). Mr. Gilbert testified that he believed that the security guard, Mr. Brodie had a flashlight (Depo. Tr. Jason Gilbert, p. 55) but he was not certain about that (Depo. Tr. Jason Gilbert, p.46)

39. Mr. David Brodie works for a company providing security guard services. In January of 2013, he was working on the Employer's property providing security guard services (Depo. Tr. David Brodie, pp. 5-6). Mr. Brodie has had interactions with the Claimant while working as a security guard. Around 1:00 in the morning on January 10, 2013, Mr. Brodie saw the Claimant laying next to the stairway that went to the employees parking lot. Mr. Brodie testified that the Claimant was lying facedown with his arms raised above his head near his ears (Depo. Tr. David Brodie, pp. 7-8). Mr. Brodie testified that the Claimant was lying about 2 to 3 feet away from the stairs on the left side (Depo. Tr. David Brodie, p. 8). Mr. Brodie testified that he had a flashlight and used it to see the Claimant and did not see any blood or abrasions and did notice anything on the stairs (Depo. Tr. David Brodie, p. 9). Mr. Brodie reviewed the handwritten statement that he wrote shortly after the incident when he found the Claimant lying face down. In his written statement, Mr. Brodie states he was making rounds at 12:35 AM and at 12:45 AM he found the Claimant and tried to get a response

from him. He did not get a response so he called the dispatch office to tell them that there was a driver passed out at the parking lot and that Mr. Brodie was calling an ambulance (Depo. Tr. David Brodie, pp. 15-16; Respondents' Exhibit J, p. 183). Mr. Brodie testified that he called 911 and then two dispatchers, Mike Hashman and Jason Gilbert came to where the Claimant was unconscious. Then, Mr. Gilbert went to meet the ambulance drivers to show them where the Claimant was. The EMTs tried to talk to the Claimant but only got a little response and they put him on a stretcher and took him away in the ambulance (Depo. Tr. David Brodie, pp. 16-17; Respondents' Exhibit J, p. 183). Mr. Brodie testified that he did not see any snow or ice on the stairs but he did recall some erosion on the sides of the stairs (Depo. Tr. David Brodie, p. 20). Mr. Brodie testified that although he used his flashlight to look at the Claimant and the stairs, he did not do a very close examination (Depo. Tr. David Brodie, p. 21).

40. Mike Hashman is a supervisor for the Employer who dispatches line haul drivers. Mr. Hashman called the Claimant on the night of January 9, 2013 asking him to come in to work to deliver a load (Depo. Tr. Mike Hashman, p. 6). Mr. Hashman's notes prepared on January 9, 2013 indicate that he called the Claimant at 21:16 PM, left a message and the Claimant called him back at 21:17 PM. The Claimant arrived at 00:10 AM on January 10, 2013. Then at 00:25 AM, the Claimant called him from the yard and said he was feeling nauseated and ill and Mr. Hashman told the Claimant to go to North Suburban as the Claimant was not in a condition that he was fit for driving (Depo. Tr. Mike Hashman, pp. 6-8 and p. 28; Respondents' Exhibit J, p. 187). Because the Claimant was not punctual for his shift, Mr. Hashman filled out notice of written warning and signed it (Depo. Tr. Mike Hashman, pp. 9-10; Respondents' Exhibit J, p. 191). Mr. Hashman was later called by the security guard and went out to the steps leading to the employee parking lot and saw the Claimant laying on the ground (Depo. Tr. Mike Hashman, p. 11). Mr. Hashman testified that he saw the Claimant to the left of the stairs with his body generally perpendicular to the stairs(Depo. Tr. Mike Hashman, pp. 12-13).

41. Northglenn Ambulance responded to the Employer's location at approximately 1:00AM on January 10, 2013 noting that the Claimant was found lying prone on the ground and there was no obvious cause of the fall. As the Claimant was rolled onto a back board, it is noted that the Claimant began to arouse and could not remember falling. The Claimant was dizzy and nauseated. The note indicates that the Claimant complained of pain in his cervical spine. He was loaded into the ambulance and transported to North Suburban Medical Center without complication (Claimant's Exhibit 7; Respondents' Exhibit C).

42. The Claimant arrived and was admitted to HealthOne North Suburban Medical Center on January 10, 2013 at approximately 1:301 AM. The Claimant reported that he fell at approximately 12:00 am to 12:30 am in the morning at work. Per the EMS, the incident more likely occurred at around 1:00 am. Dr. Alexandra Villacres, the emergency room physician noted that the Claimant had missed a step and then fell face forward towards his left side. In addition to the syncopal episode, the Claimant complained of left-sided pain in his head and trapezius, neck and ribs (Claimant's

Exhibit 8; Respondents' Exhibit B, pp. 11-12). The Claimant was evaluated for possible etiologies for his syncopal episode and it was noted that he was significantly dehydrated with an elevated creatinine level. An MRI of the brain showed no abnormalities. A formal sleep study was recommended to evaluate for sleep apnea after a nocturnal pulse oximetry study performed on the Claimant was noted to be abnormal (Claimant's Exhibit 8; Respondents' Exhibit B, p. 13). A CT scan of the Claimant's cervical spine was positive for degenerative changes only and no acute fracture or subluxation was noted (Claimant's Exhibit 8; Respondents' Exhibit B, p. 17). The bills for HealthOne North Suburban Medical Center have not been paid (Hearing Tr., p. 87).

43. On March 25, 2014, the Claimant saw Dr. Lawrence Lesnak for an IME related to alleged injuries on 12/15/2012 and 01/10/2013 and Dr. Lesnak prepared a written report (Claimant's Exhibit 17; Respondents' Exhibit A). The Claimant testified that he has issues with Dr. Lesnak's IME and report because he saw Dr. Lesnak shut off his recorder before the IME was over and never saw him turn it back on. The Claimant testified that he recorded the entire IME encounter (Depo. Tr. Claimant, pp. 6-8).

44. Dr. Lesnak credibly testified that the Claimant's syncopal episode arose due to underlying dehydration. He testified that blood testing completed on January 10, 2013 definitively established that the claimant had elevated blood urea nitrogen ("BUN") and creatinine levels. Dr. Lesnak indicated that these levels measured kidney function and dehydration. He testified that the claimant had a BUN level of 25 and a creatinine level of 1.8. Normal ranges for those data points are 10-12 for BUN and 0.8-1.2 for creatinine. He testified that this objective testing met the medical criteria for a diagnosis of dehydration. Dr. Lesnak testified that the Claimant's January 10, 2013 event was not an unexplained incident, specifically, "he had a syncope, he passed out. The – he's dehydrated, dehydration causes syncope" (Hearing Tr., p. 212, p. 232 and p. 255).

45. The ALJ credits the medical records from North Suburban Medical Center and the testimony of Dr. Lesnak and finds that Claimant's syncopal event on January 10, 2012 was caused by dehydration.

46. Alternatively, the Claimant argues that his sycnopal episode on January 10, 2013 was related to the injury he alleges occurred on December 14, 2012. Dr. Lesnak credibly testified that neither the alleged December 2012 incident nor any medication prescribed during the evaluation of that incident caused the January 10, 2013 syncopal event. Specifically, Dr. Lesnak testified that, even assuming that an incident occurred in December 2012 and that incident caused a head injury, that incident did not cause the Claimant to have a syncopal event on January 10, 2013. First, Dr. Lesnak indicated that there was no indication that the Claimant had any symptoms consistent with a closed head injury. However, even assuming there was evidence of a closed head injury arising out of the December 2012 event, Dr. Lesnak testified that the symptoms would have been abating, not worsening on January 10, 2013. "So you're not going to have effects of a – any type of closed head injury blatant like that happen all of a sudden. In fact closed head injuries by definition … the worse

is the very first couple hours of the first day, it doesn't get worse later on it gets better" (Hearing Tr., p. 233 and p. 252). Thus, it is more likely than not that there was no relation between any event occurring on December 15, 2012 and the event of January 10, 2013, other than a temporal relationship Further, Dr. Lesnak testified that the medication prescribed to the claimant on January 8, 2013 – Diclofenac and Tizanidine – had no effect on the claimant's syncopal event or the dehydration that caused it. Dr. Lesnak indicated that Tizanidine is a "non-benzodiazepine muscle relaxant" with absolutely no effect on the kidneys and no real effect on elevation of BUN or creatinine levels. Consequently, Dr. Lesnak opined that the use of Tizanidine did not cause the claimant's dehydration or syncope. Dr. Lesnak further testified that while Diclofenac could cause a bump in creatinine (under rare circumstances where the individual was taking the drug for long period of time), it could not cause elevated BUN levels. As a result, Dr. Lesnak opined that the use of Diclofenac did not cause the claimant's dehydration or syncope. (Hearing Tr., p. 247).

47. The Claimant failed to present persuasive evidence that his syncopal event was caused by an alleged prior closed head injury or medications from that injury. The ALJ credits the medical records and opinion of Dr. Lesnak and finds that the Claimant did not establish that it is more likely than not that the January 10, 2013 syncope was caused by the earlier alleged incident or medication prescribed after that incident.

Claimant's Termination from Employer

48. The Claimant acknowledged that he was disciplined for infractions at work prior to January 8, 2013, but the Claimant testified that he believes they were "made up." The Claimant recalled that a December 20th write up was for failing to do his routes within a certain amount of time (Hearing Tr., p. 94).

49. The Claimant testified that he received a phone call from Mart Kessler on February 25, 2013 that his employment was terminated as his medical card was expired and his CDL was not current (Hearing Tr., p. 94). However, Claimant's Exhibit 22 indicates that the Claimant began receiving unemployment benefit payments beginning with the week ending January 26, 2013. The Claimant received the unemployment benefit payments in accordance with the Benefit Payment History dated February 12, 2014. The last unemployment benefits the Claimant received were for the week ending December 21, 2013.

Claimant's Subsequent Employment and Reported Injury

50. The Claimant testified that he went back to work in December of 2013 for Pro Drivers, which is a service supplying truck drivers to companies. The Claimant testified that he was assigned by Pro Drivers to work for Beco, Incorporated for a two week period (Hearing Tr., p. 99).

51. The Claimant informed ProDrivers that he "quit" his employment with the employer in February 2013 and that the reason he was not working between February 2013 and December 2013 was because he was looking for work. Although the Claimant testified that he did not fill in these portions of the application for employment and that the information was taken over the phone, the Claimant did attest (through his signature) that the application for employment "was completed by [him]" and the information contained within the application was true and complete (Hearing Tr. p. 162; Respondents' Exhibit K, pp. 219-223).

52. The Claimant testified that, when he applied for the position at ProDrivers, he informed them that he was physically capable of doing the job. He also testified that he did not tell ProDrivers that he had a prior injury or problem that would prevent his ability to perform the job, which he understood to include lifting in excess of a hundred pounds. The Claimant stated that he would do anything to get a job and if he told them about his prior injury and work restrictions he wouldn't get the job (Hearing Tr., p. 143).

53. The Claimant testified that while he was working for Pro Drivers, he had a subsequent injury on January 12, 2014. The Claimant testified that he was chaining up on Vail Pass while heading eastbound on I-70. The Claimant testified that he heard a car accelerating from behind him and he looked over his shoulder and lost his balance and he slipped and fell. The Claimant testified that he injured his right shoulder, left elbow and lower left buttocks area as a result of this fall. The Claimant testified that this injury did not affect his neck, blurred vision or headaches and they were the same as before the January 2014 injury (Hearing Tr., pp. 102-104).

54. The Claimant filed a workers' compensation claim for his January 2014 incident and it is an admitted claim and he is receiving medical care for that incident (Hearing Tr., p. 104).

55. The Claimant saw Dr. Michael Ladwig for an initial visit on January 14, 2014. Dr. Ladwig reports that the Claimant advised that he was chaining up his vehicle when he had to dive out of the way of a car and he slipped and injured himself. He reported feeling a "pop" in his right shoulder. He reports a right knee, left elbow, neck and mid-low back injury. Dr. Ladwig assessed the Claimant with cervical strain, dorsal strain, lumbar strain, right shoulder strain and left elbow strain. The Claimant was placed on work restrictions and taken off work (Claimant's Exhibit 14; Respondents' Exhibit G, pp. 99-105). The Claimant continued to treat with Dr. Ladwig who later referred him to Dr. Mark Failinger for right shoulder conditions (Claimant's Exhibits 14 and 15; Respondents' Exhibits E and G).

56. The Claimant's actions and statements with respect to obtaining a job and representations he made to his subsequent employer Pro Drivers further support the conclusions that the Claimant did not suffer compensable injuries on either December 15, 2012 or January 10, 2013. In addition, the Claimant's own admissions that he will say what he needs to in order to obtain the result that he seeks further damages his credibility overall.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. Respondent bears the burden of establishing any affirmative defenses. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201 (2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

The Claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required.

Industrial Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* supra; *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The Colorado Supreme Court has identified three well-established and overarching types of risks that cause injuries to employees in the workplace: (1) employment risks, which are tied directly to the work itself; (2) personal risks, which are inherently personal or private to the employee; and (3) neutral risks, which are neither employment-related nor personal *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014).

December 15, 2012 Injury

Because the mechanism of this alleged injury reported by the Claimant was not witnessed and there were some issues with the timing of the injury, as well as the timing of the reporting of the injury to Employer, the credibility of the Claimant is a crucial component of this claim. The Claimant's credibility is first questioned due to the inconsistencies between his recollection of multiple events over a several month period as compared to reports and testimony of the other fact witnesses and the documents in evidence. The totality of the evidence does not support that the Claimant was injured on December 15, 2012 as alleged.

The Claimant testified that he was first injured while working for Employer on December 15, 2012. The Claimant testified that he was assigned to drive a route to and from Salt Lake City and he was on his way back, driving eastbound on I-80. As he was driving back, there was a blizzard and the overhead road signs were recommended reduced speeds, so the Claimant took longer than usual to get back. The Claimant testified that as he was approaching Laramie, there was quite a bit of snow on the road although the storm had passed. At this point he testified that he was back up to driving full speed when he hit a berm of snow in the road that he didn't see. He testified that as he hit the berm at a pretty high rate of speed he felt his seat go blat to the floor,

squeeze down and the shoot back up. The Claimant's head hit the ceiling and he testified that in the process it jammed his neck up too. The Claimant testified that almost immediately he had an immense headache and pain in the top of his head, back of his neck, the upper trapezius areas and his shoulders and he it was hard to turn his head to either side. The Claimant testified that he continued to drive the route but it took longer due to the previous weather and his injury. When he returned to Employer's terminal, he testified that no one was there except for one security guard. The Claimant testified that supervisors are not at the terminal on Saturday afternoons, which is when he returned after his injury, and they are not there on Sundays. So, he reported his injury to his immediate supervisor Marty Kessler by phone on Monday morning since he didn't have a home number to call Mr. Kessler over the weekend. The Claimant testified that when he called he told Mr. Kessler that he injured himself when he hit a bump in the road and he jammed his neck. The Claimant testified that he asked if he could go to the doctor and Mr. Kessler told him he would get back to him. The Claimant testified that did not hear from the Employer until Wednesday when the dispatcher called him to do a run. He testified that was off on Monday and Tuesday and testified that he did not seek medical care on those days on his own because he was having financial issues and did not want to incur doctor bills that he couldn't afford to pay. However, the Claimant later testified that he did work on Monday, December 17th when he drove a local run to Grand Junction. The Claimant testified that he requested medical care again and had a meeting with his supervisor Marty Kessler and the terminal manager Leo Raker on December 20, 2012 and they told the Claimant that if he was going to get medical care he had to go right away. The Claimant's story became more convoluted when he was cross-examined.

The Claimant's testimony is at odds with information that is contained in employment records relating to the injury that the Claimant agrees he signed and dated. However, the Claimant has unlikely explanations for the contradictions between his testimony and the records. With respect to the Employer's First Report of Injury, the Claimant argues that he did not complete all of the information and that someone else wrote it. This is similar to testimony that he later offers with respect to inconsistencies in information he provided on a job application for a subsequent employer. Moreover, the Claimant's alleged injury and the subsequent reporting of the injury happen in the middle of the Claimant receiving multiple disciplinary actions. The Claimant has argued that the Employer was out to get him in a witch hunt because he asked for a larger tractor to accommodate his height and body size. However, there is no evidence to support this and no persuasive evidence that the Employer was not amendable to providing a larger tractor for the Claimant's use as the Employer already had such a tractor available for his use at their property.

Even the Claimant's treating physician, Dr. Bloch noted this was an "odd case" because the Claimant "was originally seen November 27 for evaluation of fit for duty vs. ADA as he is 7 [sic] tall and truck don't accommodate people that tall, he was then complaining of low back pain mostly from having to hunch into the regular sized cab" and "the then returned to check in for UC on 12/20 with added neck pain from having cramping into the cabs that also cause head to rub on top of cab" and "then he

presented 12/21 for a specific injury that occurred on December 20th when he says he was driving the speed limit in his truck…he apparently specifically hit his head on the top of the cab while driving en route back from SLC and is now having said complaints." Dr. Bloch assessed the Claimant with cervical strain with subjective radiculopathy, subjective hip pain, subjective thoracic pain and PMH lumbar injury with IR and PWR. Dr. Bloch noted that he reviewed the Claimant's job functions and he did not find restrictions to activity necessary. He did note that a larger truck would be a reasonable accommodation for the Claimant and the Claimant was returned to regular duty. Dr. Bloch considered an MRI but noted that he did not see a "strong indication" due to a physical examination that was "more of an arthritic exam" and the "lack of objective neuritis" along with a "questionable history of actual traumatic injury."

Then, after the claim was contested, the Claimant testified that he did not seek any medical care with his own providers related to the December 15, 2012 incident. Dr. Lawrence Lesnak, who had performed an evaluation of the Claimant on March 25, 2014, testified that there were no objective findings with regard to the December 2012 alleged incident. He specifically opined that there was no medical evidence that the Claimant sustained any type of trauma to his neck in December 2012. He later clarified: "What I'm saying is whatever happened [in December 2012], even if it did happen, it did not leave any signs of trauma or abnormalities [or] hazards out of that potential incident."

In considering the totality of the evidence presented, the ALJ credits Dr. Lesnak's opinions along with the supporting medical records and determines that the Claimant has not established that it is more likely than not that he sustained a compensable injury in December 2012 that resulted in the need for medical treatment. The ALJ finds that the objective medical evidence does not support that an injury occurred on December 15 or December 20, 2012. Additionally, the timing of the reporting of this injury is suspect based on the employment documents in evidence. Moreover, there is considerable inconsistency related to the Claimant's testimony, statements and documents in evidence and the Claimant's actions during the time frame from December 15, 2012 to December 21, 2012. Overall, the Claimant's testimony is not found to be credible in the face of more credible and reliable evidence that was presented in this case with respect to the allegations of a December 15, 2012 injury.

In the alternative, if there was any injury, the December 2012 incident did not result in the need for permanent impairment or medical care. As noted above, the Claimant was released to MMI with no permanent impairment on January 16, 2013, after just three evaluations. Any effects of the alleged incident were resolved as of that date. The ALJ determines that the Claimant has failed to establish that the medical care rendered in December 2012 and early January 2013 was reasonable and necessary medical treatment related to a compensable injury.

The Claimant has failed to meet his burden of proving that he suffered an injury while performing services arising out of and in the course of his employment on December 15, 2012.

January 10, 2013 Injury

The causal relationship involving employment risks is generally intuitive and obvious and such risks are universally considered to "arise out of" employment and are compensable under the Act. The second category, personal risks, such as pre-existing idiopathic conditions unrelated to the employment, are typically found not to arise out of the employment and are generally not compensable, unless an exception to the rule applies. The final category is neutral risks, such as unexplained falls. Under *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014), the Supreme Court held that the "but for" test applies to these neutral risks. In such a case, an injury that arises from a neutral risk will be found to "arise out of" employment and be compensable if it would not have occurred but for the fact that the conditions and obligations of the employment placed a claimant in the position where he or she was injured.

If the precipitating cause of a fall at work is in the second category of risks, such as a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the preexisting condition to contribute to the accident or the injuries sustained. *Finn v. Industrial Commission*, supra; *Irwin v. Industrial Com'n*, 695 P.2d 763 (Colo. App. 1984); *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (I.C.A.O. July 29, 1999). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" such as that generally encountered outside the work place. *Ramsdell v. Horn*, supra. Only if the precipitating cause of a fall or misstep at work is unexplained, and thus neutral, would the injury be compensable under the *City of Brighton* analysis without the existence of a special hazard.

Here, there is sufficient evidence to establish that the Claimant's syncopal episode on January 10, 2013 was due to his dehydration. Therefore, the event of January 10, 2013 was not an unexplained fall or neutral risk. Moreover, he was dehydrated as he arrived at work, not at the end of the shift. So, his work duties were not a contributing factor in his dehydration. Because this falls under the category of personal risk, it would generally not be compensable unless a special hazard of employment combined with the personal risk to contribute to the injury sustained by the Claimant.

The Claimant testified that he reported to work on January 9, 2013 at approximately 11:30pm but that he suffered an injury as he was in the process of reporting. The Claimant testified that he was taking some essential items from his personal vehicle which was in the parking lot next to where the tractors are parked. The Claimant testified that he tripped and fell and hit his head on some steps and landed to the side of the steps in the dirt. The Claimant offered photographs which were entered

into evidence as Exhibits 19, 20 and 21 to depict the stairs and the area where he testified he fell. As the Claimant was carrying items from his vehicle to the tractor he would be driving, he testified that he recalled feeling dizzy and lightheaded and as he felt his legs become weak he stumbled and hit one of the steps and fell forward. He testified that because he was carrying things, he didn't brace and he recalls falling face down in the dirt immediately to the left of the steps. After this, the Claimant testified, he blacked out and does not have recollection after going unconscious until he woke up in the emergency room. He specifically testified that he does not recall the ambulance ride to the hospital.

Mr. Mark W. Passamaneck, a professional engineer working primarily in forensic engineering and analysis for twenty years, testified as an expert in the area of forensic engineering. Mr. Passamaneck was asked to comment on the location of the Claimant's body, found to the left of the stairs as indicated in witness statements and testimony in relation to the Claimant's testimony that he tripped as he was walking up the stairs. Mr. Passamanek opined that the Claimant's testimony does not make sense from a forensic engineering perspective because if the Claimant was walking up the stairs and he tripped and fell, he would have fallen onto the stairs. If the Claimant had attempted to guard against the fall, the Claimant's upper body would be further off the axis of the stairs in comparison to his feet but a drawing prepared by Jason Gilbert regarding the Claimant's body position in relation to the stairs shows the upper body closer to the stairs and the feet further away. Mr. Passamaneck also noted that the medical information and statements that he read indicate that the Claimant did not suffer cuts or abrasions consistent with falling on cement stairs. Mr. Passamaneck testified that there was nothing unusual in the area where the Claimant was reported to be found unconscious that would have caused a fall, it was just a gently sloping dirt hill. On cross-examination, Mr. Passamaneck conceded that he did not know if there had been snow or ice on the stairs on the night when the Claimant was found unconscious. However, several other fact witnesses testified that there was not snow or ice in that area.

There was persuasive and credible testimony from other witnesses as to the Claimant's unusual behavior on the night of January 9th into the early morning of January 10th. Mr. Jason Youmans testified that the Claimant complained about not being able to find a particular truck that was right out front parked along the side of the building they were in. Mr. Youmans testified that while he was speaking with the Claimant , he was concerned about the Claimant's behavior since he wasn't responding to anything Mr. Youmans had said and he didn't look normal; he looked pale and like he was getting sick. Shortly after the encounter with Mr. Youmans, the Claimant was found face down in the dirt on the left side of stairs that led to the employee's parking lot.

Northglenn Ambulance responded to the Employer's location at approximately 1:00AM on January 10, 2013 noting that the Claimant was found lying prone on the ground and there was no obvious cause of the fall. As the Claimant was rolled onto a back board, it is noted that the Claimant began to arouse and could not remember falling. The Claimant was dizzy and nauseated. The note indicates that the Claimant

complained of pain in his cervical spine. He was loaded into the ambulance and transported to North Suburban Medical Center without complication. The Claimant arrived and was admitted to HealthOne North Suburban Medical Center on January 10, 2013 at approximately 1:301 AM. The Claimant reported that he fell at approximately 12:00 am to 12:30 am in the morning at work. Per the EMS, the incident more likely occurred at around 1:00 am. Dr. Alexandra Villacres, the emergency room physician noted that the Claimant had missed a step and then fell face forward towards his left side. In addition to the syncopal episode, the Claimant complained of left-sided pain in his head and trapezius, neck and ribs. The Claimant was evaluated for possible etiologies for his syncopal episode and it was noted that he was significantly dehydrated with an elevated creatinine level. An MRI of the brain showed no abnormalities. A formal sleep study was recommended to evaluate for sleep apnea after a nocturnal pulse oximetry study performed on the Claimant was noted to be abnormal. A CT scan of the Claimant's cervical spine was positive for degenerative changes only and no acute fracture or subluxation was noted.

On March 25, 2014, the Claimant saw Dr. Lawrence Lesnak for an IME related to alleged injuries on 12/15/2012 and 01/10/2013 and Dr. Lesnak prepared a written report. Dr. Lesnak also credibly testified that the Claimant's syncopal episode arose due to underlying dehydration. He testified that blood testing completed on January 10, 2013 definitively established that the claimant had elevated blood urea nitrogen ("BUN") and creatinine levels. Dr. Lesnak indicated that these levels measured kidney function and dehydration. He testified that the claimant had a BUN level of 25 and a creatinine level of 1.8. Normal ranges for those data points are 10-12 for BUN and 0.8-1.2 for creatinine. He testified that this objective testing met the medical criteria for a diagnosis of dehydration. Dr. Lesnak testified that the Claimant's January 10, 2013 event was not an unexplained incident, specifically, "he had a syncope, he passed out. The – he's dehydrated, dehydration causes syncope."

Crediting the medical records from North Suburban Medical Center and the testimony of Dr. Lesnak, the ALJ found that Claimant's syncopal event on January 10, 2012 was caused by dehydration.

Alternatively, the Claimant argues that his sycnopal episode on January 10, 2013 was related to the injury he alleges occurred on December 15, 2012. Dr. Lesnak credibly testified that neither the alleged December 2012 incident nor any medication prescribed during the evaluation of that incident caused the January 10, 2013 syncopal event. Specifically, Dr. Lesnak testified that, even assuming that an incident occurred in December 2012 and that incident caused a head injury, that incident did not cause the Claimant to have a syncopal event on January 10, 2013. First, Dr. Lesnak indicated that there was no indication that the Claimant had any symptoms consistent with a closed head injury. However, even assuming there was evidence of a closed head injury arising out of the December 2012 event, Dr. Lesnak testified that the symptoms would have been abating, not worsening on January 10, 2013. "So you're not going to have effects of a – any type of closed head injury blatant like that happen all of a sudden. In fact closed head injuries by definition … the worse is the very first couple

hours of the first day, it doesn't get worse later on it gets better." Thus, it is more likely than not that there was no relation between any event occurring on December 15, 2012 and the event of January 10, 2013, other than a temporal relationship Further, Dr. Lesnak testified that the medication prescribed to the claimant on January 8, 2013 – Diclofenac and Tizanidine – had no effect on the claimant's syncopal event or the dehydration that caused it. Dr. Lesnak indicated that Tizanidine is a "non-benzodiazepine muscle relaxant" with absolutely no effect on the kidneys and no real effect on elevation of BUN or creatinine levels. Consequently, Dr. Lesnak opined that the use of Tizanidine did not cause the claimant's dehydration or syncope. Dr. Lesnak further testified that while Diclofenac could cause a bump in creatinine (under rare circumstances where the individual was taking the drug for long period of time), it could not cause elevated BUN levels. As a result, Dr. Lesnak opined that the use of Diclofenac did not cause the claimant's dehydration or syncope. (Hearing Tr., p. 247).

The Claimant failed to present persuasive evidence that his syncopal event was caused by an alleged prior closed head injury or medications from that injury. The ALJ credits the medical records and opinion of Dr. Lesnak and finds that the Claimant did not establish that it is more likely than not that the January 10, 2013 syncope was caused by the earlier alleged incident or medication prescribed after that incident.

Based on the totality of the testimony and evidence, the Claimant's injury was more likely than not caused by dehydration. Further, there was not sufficient evidence to prove that any preexisting condition combined with a special hazard unique to his work situation. Thus, the Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury arising out of and during the course of employment with the Employer on January 10, 2013. The Claimant's injury was not unexplained, nor was there a special hazard that combined with his personal risk. As such, there is no persuasive evidence to support a finding of causation.

Remaining Issues

The Claimant's alleged injuries of December 15, 2012 and January 10, 2013 are not found to be compensable. As such, the remaining are moot.

ORDER

It is therefore ordered that:

1. The Claimant has failed to sustain his burden of proving by a preponderance of the evidence that he suffered a compensable injury on either December 15, 2012 or January 10, 2013.

2. The Claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 28, 2015

Kimberly A. Allegretti
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the surgery recommended by Dr. Philip Marin on July 14, 2014 for operative exploration of the claimant's dorsal fifth CMC region for debridement of the joint as necessary, synovectomy, and possible neuroma excision is reasonable and necessary medical treatment to cure or relieve the claimant from the effects of his admitted work injury.

FINDINGS OF FACT

1. The claimant is a fifty-five year-old man who works for the respondent-employer as a mechanic.

2. On January 8, 2013, the claimant was bitten by a dog in the course and scope of his employment duties. The claimant sustained puncture wounds on his right hand.

3. The claimant initially underwent medical treatment at the emergency department of Parkview Medical Center. X-rays of his right hand were negative for a fracture. The claimant's wound was sutured and he was released.

4. The claimant followed up with Dr. Philip Marin on January 16, 2013. Dr. Marin recommended surgical repair of both extensor tendons. Dr. Marin performed his first surgery on the claimant on January 17, 2013. The surgery consisted of excision of the wound, exploration with repair of tendon injuries to the small finger and extensor tendon.

5. In March 2013, the claimant complained of sensitivity over the wound site. Dr. Marin opined that the extreme sensitivities the claimant was having should resolve with time. If the sensitivity did not resolve, he opined that the claimant may have a small neuroma that may require surgery.

6. The claimant was referred to, and was examined by Dr. Kavi Sachar on May 1, 2013. The claimant presented with a complaint of right small finger numbness and painful nodules in the right palm. Dr. Sachar's diagnosis was pain and numbness in the right hand after extensor tendon repair and dog bite. He noted that the claimant had

significant pain and numbness along the dorsum of the hand with some tenderness along the volar portion of the hand with some small nodules. Dr. Sachar noted “I don’t know that this is something that we can make better. It may have to get better on its own.”) Dr. Sachar also opined that “at this point I don’t see any indications for further surgical intervention.”

7. Despite the recommendations by hand surgeon, Dr. Sachar, the claimant underwent two additional surgeries. The claimant’s condition has continued to get worse.

8. Dr. Marin performed an excision of scar tissue and neuroma from the claimant’s right wrist, and repair of the dorsal sensory branch of the ulnar nerve on January 2, 2014. Dr. Marin’s operative notes state there was a neuroma and inflammation on the dorsal sensory branch of the ulnar nerve. The neuroma appeared to be involving the entire width of the nerve. The neuroma was excised and the dorsal sensory branch was repaired.

9. The clamant followed up with Dr. Marin on January 23, 2014 and appeared to be healing well in the dorsal hand. However, he still had complaints of numbness involving the ulnar nerve distribution and as a result Dr. Marin requested a third surgery.

10. Dr. Marin performed an ulnar nerve decompression on February 13, 2014. The operative report provides; “as the nerve was unroofed it was significantly compressed in the Guyon canal. Once full decompression was performed, there was no obvious injury to the ulnar nerve noted.” Dr. Marin noted during the claimant’s first post-op visit that the ulnar nerve was starting to wake up again. The claimant was experiencing pain in the radial tunnel. Dr. Marin also commented that the claimant continued to have pain at the CMC joint of the fifth digit.

11. When the claimant followed up with Dr. Marin on July 14, 2014, the claimant had overall good sensation in the ulnar nerve area. He did complain that he had pain in the fifth CMC region and over the extensor mechanism in that region.

12. As a result of the claimant’s continuing pain in his hand, Dr. Marin recommended a fourth surgery. Dr. Marin recommended “operative exploration of the dorsal fifth CMC region for debridement of the joint as necessary, synovectomy, and possible neuroma excision as it is exquisitely tender.”

13. Dr. Wallace Larson provided an opinion regarding this request for surgery. At the time of Dr. Marin’s request to perform a fourth surgery on the claimant, Dr.

Larson was familiar with the claimant's condition. Dr. Larson had examined the claimant on June 17, 2014, less than a month before Dr. Marin's request for a fourth surgery. Dr. Larson noted that the back of the claimant's right hand was still very sensitive. The claimant reported numbness and pain in the distribution of the cutaneous sensory branch of the ulnar nerve.

14. On August 11, 2014, Dr. Larson issued a report that concluded any additional surgeries would be unlikely to help the claimant's pain and limitations. Dr. Larson also stated that there was no indication that a specific correctable condition had been identified. Dr. Larson also opined that the recommended surgery would not be beneficial to relieving or curing the effects of the industrial injury.

15. Dr. Larson also explained at hearing that Dr. Marin previously went in and removed the neuroma (a painful stump of the nerve) which had formed at the sensory part of the ulnar nerve, as a result of the original injury. The formation of a neuroma is the result of cutting any nerve. When a nerve is cut the tissue in the nerve try to grow out to find the other end of the nerve. When there is nothing connecting the nerve, the nerve fibers form a bit of a lump, similar to what scar tissue would be. These neuromas can be very sensitive. Although the claimant does have a painful neuroma on the end of his ulnar nerve, Dr. Larson opined that the likelihood of Dr. Marin being able to again remove the neuroma without further damaging the ulnar nerve is very slim. Rather, he opined, the requested surgery poses the risk of a new more painful neuroma forming at the end of the ulnar nerve, as well as the risk of further damaging the ulnar nerve itself.

16. Dr. Larson agreed that upon examination it appears claimant has a painful neuroma on his hand. However, he opines that going in and removing a neuroma for the second time is very unlikely to improve the situation.

17. In addition, there is no indication for this surgery, such as an infection or inflammation in the joint that has been identified. Dr. Larson opines that this recommended surgery is very unlikely to improve the claimant's situation. It is mere conjecture by Dr. Marin that there is anything in that joint that can be made better. This surgery carries a high risk of making the claimant's joint more painful. Moreover, Dr. Marin has not even identified whether or not the 5th CMC joint is the source of the pain. Attempting to operate on this joint also poses a risk of damaging the nerve further. Even if Dr. Marin's goal is not to do anything to the nerve, it will be very difficult to protect the nerve from additional injury while attempting to get into the 5th CMC joint to take a look inside.

18. It is clear that claimant has some type of pain problems. However, any operation in that area tends to trigger some very aggressive pain responses and will make the pain worse.

19. Dr. Larson provided several reasons why the requested surgery is likely to increase claimant's pain and dysfunction and will not relieve the effects of claimant's hand injury. Dr. Marin has already performed a neuroma excision on January 2, 2014. This fourth requested surgery will not result in the resolution of his symptoms and there is a significant risk that this may increase his symptoms. Dr. Larson opined that any additional operation will cause more scar tissue and more irritation to his nerves. This will result in reduced motion of the tendons and increased stiffness and pain.

20. Based on Dr. Larson's report, the respondent-insurer denied the requested surgery by filing an Application for Hearing.

21. Based upon a totality of the medical evidence, the ALJ finds that the opinions of Dr. Larson concerning the reasonableness and necessity of the proposed surgery are more credible and persuasive than medical opinions to the contrary.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that the proposed surgery is reasonable and necessary to cure or relieve the claimant from the effects of his industrial injury.

CONCLUSIONS OF LAW

1. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. (2014) A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. (2014) A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S. (2014)

2. The respondents must provide medical benefits to cure or relieve the effects of the industrial injury. It is well established that a General Admission of Liability for medical benefits does not make the respondents liable for all of the claimant's subsequent medical treatment. *Rakestraw v. Amer. Med. Response,* W.C. No. 4-384-349 (I.C.A.O. Oct. 3, 2005). To the contrary, the respondents retain the right to dispute

liability for specific medical treatment on the grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. Ct. App. 1997). This law acknowledges that even though an admission is filed, the claimant bears the burden of proving the right to specific medical benefits and the mere admission that an injury occurred and treatment is needed cannot be construed as an admission that all post-injury medical treatment is caused by the injury. *HLJ Mgt. Group Inc. v. Kim*. 804 P.2d 250 (Colo. Ct. App. 1990).

3. The respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker,* W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000)

4. It is solely within the ALJ's discretionary province to weigh the evidence and determine the credibility of expert witnesses. *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964 (Colo. App. 2012).

5. Dr. Marin's request for a fourth surgery consists of operative exploration of the dorsal fifth CMC region for debridement of the joint, a synovectomy, and possible neuroma excision.

6. Dr. Marin noted in his reports over the past year that he excised the neuroma, he decompressed the ulnar nerve, the ulnar nerve was without injury, the extensor tendons were in good condition, and the dorsal sensory branch was repaired.

7. Dr. Larson agreed that upon examination it appears claimant has a painful neuroma on his hand. However, he opines that going in and removing a neuroma for the second time is very unlikely to improve the situation.

8. In addition, there is no indication for this surgery, such as an infection or inflammation in the joint that has been identified. Dr. Larson opines that this recommended surgery is very unlikely to improve the claimant's situation. It is mere conjecture by Dr. Marin that there is anything in that joint that can be made better. This surgery carries a high risk of making the claimant's joint more painful. Moreover, Dr. Marin has not even identified whether or not the 5^{th} CMC joint is the source of the pain. Attempting to operate on this joint also poses a risk of damaging the nerve further. Even

if Dr. Marin's goal is not to do anything to the nerve, it will be very difficult to protect the nerve from additional injury while attempting to get into the 5th CMC joint to take a look inside.

9. It is clear that claimant has some type of pain problems. However, any operation in that area tends to trigger some very aggressive pain responses and will make the pain worse.

10. Dr. Larson provided several reasons why the requested surgery is likely to increase claimant's pain and dysfunction and will not relieve the effects of claimant's hand injury. Dr. Marin has already performed a neuroma excision on January 2, 2014. This fourth requested surgery will not result in the resolution of his symptoms and there is a significant risk that this may increase his symptoms. Dr. Larson opined that any additional operation will cause more scar tissue and more irritation to his nerves. This will result in reduced motion of the tendons and increased stiffness and pain.

11. The claimant has not presented sufficient evidence that the requested procedures are reasonable and necessary or will help to relieve or cure the effects of the work injury.

12. The claimant has already undergone three surgeries by Dr. Marin. Another surgery, which poses a high risk of increase the claimant's pain and suffering is not reasonable or necessary medical treatment. Therefore, the respondents are not liable for this surgery request.

13. The ALJ concludes that the medical opinions of Dr. Larson are more credible and persuasive than medical opinions to the contrary.

14. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the proposed surgery is reasonable and necessary to cure or relieve the claimant from the effects of his industrial injury.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's request for the recommended surgery is denied and dismissed.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 8, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues addressed in this decision involve Claimant's entitlement to disfigurement benefits and maintenance medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works for Respondent-Employer as a safety security officer on a psychiatric unit housing both civilly and criminally committed patients.

2. On March 8, 2013 Claimant was involved in a team restraint of a psychotic patient who had become aggressive on the unit. In the process of neutralizing the patient, Claimant injured his neck and right shoulder, resulting in pain and dysfunction.

3. On April 4, 2013 an MRI of the right shoulder was obtained, which demonstrated a "3 centimeter full thickness rotator cuff tear with tendinosis involving the infraspinatus and subscapularis components and a probable small partial tear of the distal subscapularis tendon and overlying rotator interval.

4. Claimant underwent right shoulder arthroscopic rotator cuff repair surgery performed by Dr. David Weinstein in June 2013 followed by post surgical physical therapy (PT).

5. Claimant reported substantial relief of his shoulder pain and improved range of motion following surgery and PT. He quickly transitioned to a home exercise program (HEP) for his shoulder. Nonetheless, Claimant's neck pain, particularly pain localized to the right lateral cervical region with radiation to the parascapular area persisted. Consequently, an MRI of the cervical spine was obtained on December 16, 2013. This imaging revealed "chronic C5-6 spondylosis, right-sided uncinate arthropathy and spurring with presumed disc herniation causing severe stenosis of the right neural foramen and right lateral recess and impingement of the C6 nerve.

6. Claimant was referred to Accelerated Recovery Specialists where he undertook treatment with Dr. Michael Sparr and Dr. Stephen M. Scheper for his neck complaints.

7. On December 18, 2013 Dr. Sparr opined that Claimant's ongoing neck pain

appeared to stem from a right C6 radiculopathy. Consequently, a cervical epidural steroid injection (ESI) was scheduled.

8. On February 20, 2014, Dr. Scheper administered a cervical facet joint injection at the right C2-3 and C3-4 levels.

9. On March 5, 2014 Claimant followed-up with Dr. Sparr. During this encounter, Claimant informed Dr. Sparr that he had realized no benefit from the injection provided by Dr. Scheper. He reported continued burning pain in the right lateral cervical region radiating into the scapula and intermittently into the right radial arm, thumb and index finger. Dr. Sparr scheduled an electrodiagnostic (EMG) study and recommended a second epidural steroid injection using a transforminal approach at C5-6.

10. Claimant's EMG completed March 17, 2014 was interpreted by Dr. Sparr as being mildly abnormal with "borderline to mild median mononeuropathy" at the level of the carpal tunnel, which was determined to be non-work related. Claimant's right transforaminal ESI at C5-6 was administered March 27, 2014. By report of Dr. Daniel Olson, the designated provider for this injury, Claimant had a "good, but very short response to the 2nd ESI."

11. In conjunction with his cervical spine treatment through Dr. Sparr, Claimant was referred for additional physical therapy for modalities, massage therapy (MT) and dry needling. Dr. Sparr also provided trigger point injections and Claimant received chiropractic care.

12. On May 9, 2014, Dr. Olson stopped Claimant's dry needling as it had not "provided any significant benefit and it is uncomfortable for [Claimant]." Dr. Olson also requested a surgical opinion concerning Claimant's neck. Claimant was referred to Dr. James Sceats.

13. On May 14, 2014 Claimant reported to Dr. Sparr that dry needling, massage therapy and trigger point injections combined with massage had not provided lasting benefit. Dr. Sparr indicated that Claimant continued to experience "persistent cervicothoracic pain which [had] not responded to a multiplicity of treatments including facet injections, epidural steroid injections, trigger point injections, massage therapy, physical therapy, chiropractic, and dry needling. Dr. Sparr had no further ongoing treatment suggestions and nothing left to offer.

14. On May 22, 2014, Claimant was evaluated by Dr. Sceats who assessed "neck pain secondary to degenerative spondylosis and myofascial neck pain with asymptomatic right C5-6 foraminal stenosis. Dr. Sceats did not feel that Claimant would benefit from surgical intervention and noted that "continued physical therapy may improve [Claimant's] cervical range of motion. No ongoing treatment recommendations were made.

15. Claimant attended an appointment with Dr. Olson on July 14, 2014 at which

time he reported constant aching pain in the neck made worse by sitting and standing. Claimant reported that his pain "improved with pain medicine" and that he was using "Aleve which usually gets him through the day."

16. Dr. Olson placed Claimant at MMI on August 12, 2014 with impairment. Concerning ongoing medical treatment, Dr. Olson noted as follows: "None anticipated. Respondents have denied liability for future reasonable, necessary and related medical benefits.

17. Claimant testified that he is working full duty, 3 days/week, 13 ½ hours/day. Claimant testified that he continues to have pain, headaches and muscle spasms on a daily basis. According to Claimant he gets muscle spasms originating on the right side of his neck upwards of six (6) times a day. He has generalized muscle tightness in the area of his neck and shoulder and experiences headaches that travel from the base of his skull upwards over his head.

18. Based upon complete and careful review of the medical records, the ALJ finds support for Claimant's testimony concerning his ongoing symptoms and spasms. The records outline tenderness and myofascial tightness in the right parascapular musculature including the trapezius, levator scapula and the rhomboids. There is reference in the medical record to Dr. Sparr wanting Claimant to proceed with massage therapy "again" to address Claimant's "scapular-thoracic spasms." The ALJ finds, from the evidentiary record that more probably than not, Claimant's ongoing symptoms/spasms are emanating from his neck.

19. Claimant testified that approximately eight (8) hours into his shift he becomes increasingly achy and sore. Claimant testified that he has been prescribed Flexeril for his muscle spasms in the past. He found it helpful in loosening the muscle tension associated with his spasms. Claimant also testified that he has been prescribed Vicodan which was useful in reducing the pain associated with his neck. The ALJ is unable to find any reference to Claimants need for or use of Vicodan in the records submitted as evidence in the case. Claimant wants the ability to obtain ongoing medications under his workers compensation claim to help relieve him of the ongoing effects/symptoms associated with his work-related injuries.

20. Claimant's medical records reveal that over the course of his treatment he has been prescribed medications to address the problems attendant with his injuries. A listing of Claimant's medications as provided for by Dr. Olson at the time Claimant was placed at MMI includes the following: Atenolol, Neurontin, Norvasc, Lorazepam, Robaxin, Flexeril, Prozac, Trazodone, and Motrin. On May 14, 2014 at the time Claimant saw Dr. Sparr for the last time, Dr. Sparr referenced the following regarding Claimant's use of medication: "He takes Neurontin 330 mg 3 times per day, Flexeril at night, ibuprofen as needed, trazodone 50 mg at night, and Prozac during the day." The ALJ finds Claimant's need for medication reasonably necessary to relieve him of the effects of the injury. Further, the ALJ finds Claimant's need for medication related to his

industrial injury. Without ongoing medication, the ALJ finds that Claimant's condition will likely deteriorate.

21. The ALJ credits the medical records and Claimant's testimony to find that Claimant is in need of maintenance medical treatment, including prescription medications.

22. Claimant has a visible disfigurement to the body consisting of four (4) lightly pigmented, 1/2 inch long by 1/16 inch wide arthroscopic surgical scars, in addition to moderate atrophy of the right shoulder girdle as a consequence of his right shoulder surgery.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

C. A workers' compensation case is decided on its merits. *Section 8-43-201*. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Maintenance Medical Benefits

D. Claimant is entitled to ongoing medical benefits after MMI if he presents substantial evidence that future medical treatment will be reasonably necessary to relieve the claimant of the effects of the injury or prevent deterioration of the claimant's condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). While Claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment, Claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). Here, the ALJ concludes that Claimant has met his burden to establish his entitlement to maintenance medical treatment. The record evidence is replete with references to Claimant's limited response to active treatment designed to improve his condition. As a result, Claimant continues to suffer from ongoing pain and spasms which are relieved by the use of medication. Without ongoing treatment/medications Claimant's present condition will likely deteriorate further. Consequently, Claimant has proven, by a preponderance of the evidence that there is a probable need for treatment post MMI, which entitles him to an order for ongoing medical benefits.

E. An award of *Grover* medical benefits should be a "general order" awarding ongoing medical benefits. *Stollmeyer v. Industrial Claim Appeals Office, supra.* Even with a general award of maintenance medical benefits, however, the respondent still retains the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity). Indeed, Claimant has requested a general order for maintenance medical benefits subject to Respondent-Employer's right to dispute specific care.

F. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant has surgical scarring and atrophy of the shoulder girdle which alters the natural appearance of his right shoulder. The ALJ concludes Claimant's visible scarring and atrophy constitutes a disfigurement provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant is entitled to ongoing medical treatment reasonably necessary and related to his March 8, 2013 industrial injury to maintain MMI.

2. Respondent-Employer retains the right to dispute any treatment recommended on the basis that the need for treatment is not causally related to Claimant's March 8, 2013 work injury and/or whether any recommended treatment is reasonable and necessary.

3. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Respondent-Employer shall pay Claimant $1,800.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 29, 2015

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Respondent violated W.C.R.P. Rule 16-9(B) by failing to deny Peter Millett, M.D.'s June 11, 2014 request for authorization for left shoulder surgery or apply for a hearing within seven business days of June 11, 2014.

2. Whether Claimant has demonstrated by a preponderance of the evidence that medical treatment in the form of left shoulder surgery as recommended by Peter Millett, M.D. is reasonable, necessary and related to her March 10, 2013 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 66 year old female who works for Employer as a Ski Instructor. On March 10, 2013 Claimant was struck by another skier and sustained admitted industrial injuries.

2. During March 2013 Claimant received medical treatment from Nurse Practitioner Lucia London at Vail Sports Medicine Physical therapy. NP London diagnosed Claimant with a closed head injury, left neck pain and left shoulder pain. She recommended medications and physical therapy. NP London also assigned work restrictions that included no skiing.

3. On April 22, 2013 Claimant visited NP London and reported "quite a bit of shoulder pain." Claimant remarked that she felt a clicking in her left shoulder with certain arm movements and her left shoulder pain wakes her up at night. Claimant also commented that the left shoulder pain radiates down under her left arm and up to the left side of her neck. NP London noted that Claimant still has a bump on the left side of her left upper arm and tenderness over her left biceps. NP London ordered an MRI of Claimant's left shoulder and referred her to Orthopedic Surgeon Peter Millett, M.D.

4. An April 25, 2013 MRI of Claimant's left shoulder revealed moderate to severe glenohumeral osteoarthritis with extensive high-grade and full thickness chondral loss, degenerative tearing and fraying of the glenoid labrum, a small partial-thickness tear of the supraspinatus and minimal medial subluxation of the biceps tendon at the bicipital groove.

5. On May 3, 2013 Claimant visited Dr. Millett for an examination. He diagnosed Claimant with left shoulder bicipital tendinitis, osteoarthritis and a partial supraspinatus tear. Dr. Millett injected the glenohumeral space in Claimant's left shoulder. He recommended continued physical therapy and medications.

6. On June 21, 2013 NP London noted that Claimant was gaining strength in her left upper extremity and increasing her range of motion. Claimant reported the injection she received from Dr. Millett provided 3-4 weeks of relief but then her pain returned. Claimant also noted popping in her left shoulder. NP London recommended six weeks of work conditioning and continued medications. She also recommended continued work restrictions.

7. On July 23, 2013 Claimant returned to Dr. Millett. She stated that overall her shoulder was doing much better. Physical examination revealed good grip strength along with full range of motion. Although the report references "right" shoulder it is undisputed that the injury is to the left shoulder. Dr. Millett assessed Claimant with osteoarthritis causing generalized joint pain.

8. On August 1, 2013 Claimant presented to Susan Lan, M.D. at Vail Valley Medical Center/Occupational Health (VVMC). Claimant reported that she was "much improved since her initial injury." Dr. Lan noted, "she was seen by Dr. Millett for the shoulder, who recommended additional physical therapy and follow-up only as needed, no surgical indication." Additionally, Dr. Lan remarked that Claimant had stated she is "significantly improved" but not back to baseline.

9. On October 1, 2013 Claimant returned to Dr. Millett for an evaluation. Claimant stated to Dr. Millett that "she has not had any improvements in her symptoms of her left shoulder. . ." Dr. Millett advised Claimant that the osteoarthritis in her left shoulder constituted a chronic condition that was "possibly" exacerbated by the injury in March. He recommended continued conservative treatment for the left shoulder but advised of the possibility of an arthroscopic procedure if she did not respond to the treatment. However, Dr. Millett remarked that a total shoulder arthroplasty would be a "definitive" treatment for Claimant's osteoarthritis.

10. On October 29, 2013 Lawrence Lesnak, M.D. conducted a records review of Claimant's claim. Dr. Lesnak determined that Claimant's March 10, 2013 industrial injury "did not result in any type of anatomic changes to any of her bones, joints, spine, nerves, etc." He remarked that Claimant's "previous and/or current left elbow complaints appear to be completely unrelated" to the March 10, 2013 industrial incident. Dr. Lesnak added that "it appears [Claimant] has essentially reached a state of maximum medical improvement." He commented that Claimant also did not require any specific work restrictions. Finally, Dr. Lesnak noted that Claimant did not have any permanent impairment.

11. On November 21, 2013 Claimant returned to Dr. Lan for an examination. Claimant stated that she had been walking uphill and began to experience increased pain in her left shoulder. Further, Claimant advised that she had undergone an evaluation in Denver with regard to thoracic outlet syndrome but did not have the condition. Dr. Lan observed that Claimant's left shoulder strain was "improving nicely."

12. On January 9, 2014 Claimant visited Dr. Lan for an examination. Claimant had returned to work as a ski instructor for up to three hours per day and "has done well

with this." She reported being able to do more things with her left shoulder, including pushing herself on her skis to traverse a hill, "which previously would have caused significant pain in the left shoulder." Physical examination revealed good range of motion with improved strength. Dr. Lan again noted that Claimant's left shoulder strain was improving.

13. On February 27, 2014 Claimant returned to Dr. Lan. She noted that Claimant was doing better but continued to have discomfort near her left elbow. Claimant completed a pain diagram and noted left shoulder pain, left upper arm pain, lower arm pain as well as pain in her upper back and neck area. Dr. Lan noted that Claimant continued to have pain with range of motion and weakness extending down the medial and posterior aspects of her left arm to the elbow. Dr. Lan recommended continued physical therapy, acupuncture, medications and six sessions of psychotherapy. She also recommended additional blood work regarding Claimant's chronic pain.

14. On March 14, 2014 Claimant presented to Dr. Millett. Claimant reported a deep aching left shoulder discomfort. Dr. Millett noted Claimant's examination was consistent with progressive glenohumeral arthritis with bicep tendonitis of her left shoulder. He discussed a potential arthroscopic surgery as opposed to a total shoulder replacement for Claimant. Dr. Millett did not affirmatively recommend a surgery but instead referred Claimant for an updated MRI.

15. On May 22, 2014 Claimant returned to Dr. Millett to discuss the MRI results. The MRI revealed grade 4 chondral changes of the glenohumeral joint. Claimant was still "bothered" by left shoulder pain with activities. However, she denied any neurological symptoms in the left upper extremity. Physical examination revealed crepitus with range of motion of the shoulder. Dr. Millett noted he spoke with Claimant regarding continued non-operative treatment versus a CAM procedure versus total shoulder arthroplasty. He advised Claimant that her "ultimate treatment" will be a total arthroplasty but he may be able to "buy her some additional time without an arthroplasty if she consents to the arthroscopy procedure." The medical note on May 22, 2014 does not contain a definitive recommendation with regard to the proposed procedure.

16. On June 11, 2014 Dr. Millett's office, The Steadman Clinic, faxed a request for prior authorization to third-party administrator Liberty Mutual. The fax cover sheet reflects that Dr. Millett requested authorization for an outpatient left shoulder arthroscopy, debridement, manipulation under anesthesia, capsular release, lysis of adhesions, removal of loose bodies, osteoplasty, axillary nerve neurolysis, intraoperative fluoroscopy, subacromial decompression and biceps tenodesis. The request for prior authorization was faxed to telephone number (603) 334-8096. Julie Pavelka, an adjuster at Liberty Mutual who had been handling Claimant's Workers' Compensation claim, testified that the preceding telephone number is the general fax number for the Liberty Mutual office in Irving, Texas. The request for prior authorization included a fax cover sheet that described the requested procedure. In addition, the request for prior authorization included Dr. Millett's note dated March 14, 2014 and an

MRI review note dated March 31, 2014. Finally, the request for prior authorization included the actual MRI report.

17. On June 17, 2014 insurance coordinator for The Steadman Clinic, Melissa Pohlman, emailed Ms. Pavelka and asked, "also wondering where we stand with authorization for surgery for [Claimant]." Ms. Pavelka responded she had not yet received a formal request. Ms. Pohlman advised one was faxed on June 11th and then asked "what a good fax number" would be to forward the request for prior authorization. Ms. Pavelka provided her personal fax number of (603) 334-3836. On June 17, 2014 Ms. Pohlman faxed the request for prior authorization directly to Ms. Pavelka.

18. On June 26, 2014 Orthpedic Surgeon Stephen D. Lindenbaum, M.D. reviewed Dr. Millett's request for prior authorization. Referencing the Colorado Medical Treatment Guidelines, Dr. Lindenbaum concluded that the procedure recommended by Dr. Millett was not medically necessary. He noted that Claimant has advanced degenerative changes in her left shoulder joint with concomitant associated pathology normally found with the degenerative process. Dr. Lindenbaum commented that the likelihood of long term improvement with Claimant's preexisting chronic problems was poor and therefore the request was not indicated. He summarized that "this Claimant has had long standing degenerative changes of the shoulder which present with usual accompanying problems including biceps pathology, cuff tears, decreased motion and loose bodies; the likelihood of lasting improvement from this request is small and most likely the Claimant would require some conservative treatment including intraarticular steroids until total left shoulder arthroplasty is indicated."

19. On June 26, 2014 Ms. Pavelka denied the request for prior authorization. On July 10, 2014 Claimant applied for a hearing seeking reasonably necessary medical benefits in the form of the requested left shoulder surgery. Moreover, Claimant sought penalties pursuant to DOWC Rule 16 for Respondent's failure to timely respond to Dr. Millett's June 11, 2014 surgical request.

20. On July 24, 2014 Claimant underwent the recommended left shoulder surgery through her private insurance.

21. During the period August through October 2014 Claimant continued to visit Drs. Lan and Millett for examinations of her left shoulder. Her shoulder condition continued to improve. On October 30, 2014 Dr. Millett noted that he could not rule out that Claimant's left shoulder condition was caused by her March 10, 2013 industrial injury.

22. On November 5, 2014 the parties conducted the pre-hearing evidentiary deposition of Dr. Lindenbaum. Upon reviewing Claimant's left shoulder MRI dated April 25, 2013 Dr. Lindenbaum testified that it showed significant arthritis in Claimant's glenohumeral joint. Additionally, the MRI revealed some irregularities to the bicep tendon and labrum. He concluded that Claimant's shoulder suffered from a degenerative condition and not an acute injury. Dr. Lindenbaum testified that the medical records reflected that Claimant had full range of motion of her left shoulder just

one month after her work injury. He explained that for a person of Claimant's age, the condition should be treated symptomatically. "If you need an occasional injection in your shoulder, we can do that. We can give you some home exercises to work on to make sure the shoulder doesn't get stiff, and if need be, even put you on a mild anti-inflammatory." Dr. Lindenbaum summarized that Claimant's degenerative joint symptoms in her left shoulder constituted the natural progression of an underlying condition.

23. Dr. Lindenbaum testified he was familiar with the Colorado Medical Treatment Guidelines regarding the upper extremity and surgical considerations. He noted that arthroscopic surgery may be considered in selective patients with moderate degrees of arthritis. He summarized that "[a]nd this is the area where I was concerned, because this [Claimant] has end-staged arthritis of her shoulder, and in my mind, the procedure she was being recommended - - was being recommended to her was one that might give her some temporary relief, but would not be long lasting and I think was not indicated. And that was the basis for my recommendation that she not have this surgery." Ultimately, Dr. Lindenbaum noted that Claimant's shoulder condition, "was treated, it seemed to be improving, and she was functionally fairly well."

24. Ms. Pavelka testified at the hearing in this matter. She explained that she has routinely dealt with the Steadman Clinic in her capacity as an insurance adjuster for Liberty Mutual. Ms. Pavelka testified that requests for prior authorization are faxed to the Liberty Mutual Utilization Management Department or to her personally. The fax number for the Utilization Management Department is (603) 334-0334. Ms. Pavelka's personal fax number is (603) 334-3836. In fact, her voicemail message contains the same instruction. She recounted that, in her experience working with The Steadman Clinic, she had never before seen a request for prior authorization be faxed to the community line. Ms. Pavelka remarked that faxing to the community line is an incorrect procedure because it is designed for any and all non-pressing matters. She commented that The Steadman Clinic routinely submitted requests for prior authorization to either Utilization Management or directly to the adjuster. For example, Ms. Pavelka noted that on October 8, 2013 The Steadman Clinic faxed a request for prior authorization to the Utilization Review Department in the present claim. She had no explanation as to why The Steadman Clinic chose to utilize the community line for Dr. Millett's prior authorization request.

25. Ms. Pavelka explained that, after Ms. Pohlman requested a "good" fax number on June 17, 2014, she received a request for prior authorization. Ms. Pavelka then obtained a medical review from Dr. Lindenbaum. Upon receipt of Dr. Lindenbaum's opinion that the requested surgical procedure was not reasonable and necessary, Ms. Pavelka filed a denial.

26. The June 11, 2014 fax from The Steadman Clinic did not constitute a completed request for prior authorization. The fax contains a list of the procedures being requested. The second page of the fax is a report from three months earlier, or March 14, 2014, in which Dr. Millett notes a discussion with Claimant regarding conservative treatment versus the potential for surgery. In the report Dr. Millett does not

recommend a surgical procedure but only discusses various potential options. Additionally, Dr. Millett recommended an MRI and the request for prior authorization contains the subsequent MRI report. Finally, the request for prior authorization includes an "MRI review" drafted by Dr. Millett. In the report, he discusses the MRI findings. Regarding the left shoulder, Dr. Millett explained, "results were conveyed to [Claimant] at length and again she is scheduled to have her knee operated on this coming Thursday, we will address the shoulder once her workers' compensation gets settled. This was conveyed to [Claimant] and we will continue to discuss further a plan with the shoulder." However, the note does not outline the plan. More specifically, Dr. Millett failed to explain the medical necessity of the recommended procedure. In fact, there is no medical documentation attached to the prior authorization request from the date of the MRI review report on March 31, 2014 through the date of the request on June 11, 2014. Accordingly, the fax and documentation sent to the Liberty Mutual community fax line on June 11, 2014 did not constitute a completed request for prior authorization. Because of the incomplete request for prior authorization Respondent did not violate Rule 16-9.

27. Claimant has failed to demonstrate that it is more probably true than not that medical treatment in the form of left shoulder surgery as recommended by Dr. Millett is reasonable, necessary and related to her March 10, 2013 admitted industrial injury. Dr. Millett sought prior authorization for an outpatient left shoulder arthroscopy procedure. On May 22, 2014 Dr. Millett had advised Claimant that her "ultimate treatment" will be a total arthroplasty but he may be able to "buy her some additional time without an arthroplasty if she consents to the arthroscopy procedure." However, Dr. Lindenbaum concluded that the procedure recommended by Dr. Millett was not medically necessary. He noted that Claimant has advanced degenerative changes in her left shoulder joint with concomitant associated pathology normally found with the degenerative process. Dr. Lindenbaum commented that the likelihood of long- term improvement with Claimant's preexisting chronic problems was poor and therefore the request was not indicated. Moreover, Dr. Lindenbaum testified he was familiar with the Colorado Medical Treatment Guidelines regarding surgical considerations and noted that arthroscopic surgery may be considered in selective patients with moderate degrees of arthritis. He summarized that the requested procedure might provide Claimant some temporary relief, "but would not be long lasting and I think was not indicated." Dr. Lindenbaum summarized that Claimant's degenerative joint symptoms in her left shoulder constituted the natural progression of an underlying condition. Based on Dr. Millett's acknowledged concerns about the long-term efficacy of the requested left shoulder procedure, the medical records and Dr. Lindenbaum's persuasive testimony, Claimant's request for prior authorization is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Prior Authorization Request

4. Workers' Compensation Rule of Procedure 16-9(b) requires the respondents to respond to a request for prior authorization within seven business days from receipt of the provider's completed requests as defined in WCRP. 16-9(e). In order to complete a request for prior authorization, the provider must "concurrently explain the medical necessity of the services requested and shall provide relevant supporting medical documentation." Supporting medical documentation means "documents used in the provider's decision making process to substantiate the need for the requested service or procedure." WCRP 16-9(f). Accordingly, if the request for prior authorization is not a "completed request," then whether the respondents have timely responded is immaterial.

5. As found, the June 11, 2014 fax from The Steadman Clinic did not constitute a completed request for prior authorization. The fax contains a list of the procedures being requested. The second page of the fax is a report from three months earlier, or March 14, 2014, in which Dr. Millett notes a discussion with Claimant regarding conservative treatment versus the potential for surgery. In the report Dr. Millett does not recommend a surgical procedure but only discusses various potential options. Additionally, Dr. Millett recommended an MRI and the request for prior authorization contains the subsequent MRI report. Finally, the request for prior authorization includes an "MRI review" drafted by Dr. Millett. In the report, he discusses the MRI findings. Regarding the left shoulder, Dr. Millett explained, "results were conveyed to [Claimant] at length and again she is scheduled to have her knee operated on this coming Thursday, we will address the shoulder once her workers' compensation gets settled. This was conveyed to [Claimant] and we will continue to discuss further a plan with the shoulder." However, the note does not outline the plan. More specifically,

Dr. Millett failed to explain the medical necessity of the recommended procedure. In fact, there is no medical documentation attached to the prior authorization request from the date of the MRI review report on March 31, 2014 through the date of the request on June 11, 2014. Accordingly, the fax and documentation sent to the Liberty Mutual community fax line on June 11, 2014 did not constitute a completed request for prior authorization. Because of the incomplete request for prior authorization Respondent did not violate Rule 16-9.

Medical Treatment

6. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that medical treatment in the form of left shoulder surgery as recommended by Dr. Millett is reasonable, necessary and related to her March 10, 2013 admitted industrial injury. Dr. Millett sought prior authorization for an outpatient left shoulder arthroscopy procedure. On May 22, 2014 Dr. Millett had advised Claimant that her "ultimate treatment" will be a total arthroplasty but he may be able to "buy her some additional time without an arthroplasty if she consents to the arthroscopy procedure." However, Dr. Lindenbaum concluded that the procedure recommended by Dr. Millett was not medically necessary. He noted that Claimant has advanced degenerative changes in her left shoulder joint with concomitant associated pathology normally found with the degenerative process. Dr. Lindenbaum commented that the likelihood of long-term improvement with Claimant's preexisting chronic problems was poor and therefore the request was not indicated. Moreover, Dr. Lindenbaum testified he was familiar with the Colorado Medical Treatment Guidelines regarding surgical considerations and noted that arthroscopic surgery may be considered in selective patients with moderate degrees of arthritis. He summarized that the requested procedure might provide Claimant some temporary relief, "but would not be long lasting and I think was not indicated." Dr. Lindenbaum summarized that Claimant's degenerative joint symptoms in her left shoulder constituted the natural progression of an underlying condition. Based on Dr. Millett's acknowledged concerns about the long-term efficacy of the requested left shoulder procedure, the medical records and Dr. Lindenbaum's persuasive testimony, Claimant's request for prior authorization is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Because of the incomplete request for prior authorization Respondent did not violate WCRP Rule 16-9.

2. Claimant's request for prior authorization for left shoulder surgery is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 21, 2015.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether Claimant has established, by a preponderance of the evidence that he is unable to earn a wage in the same or other employment, and is therefore, permanently and totally disabled as a consequence of his admitted April 20, 2013, industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant injured his low back while working for Advantage Logistics on April 20, 2013.

2. Claimant had surgery on his low back on April 30, 2013.

3. Claimant's post-surgical care was primarily provided by Frank Polanco, M.D., and Paula Homberger, PA-C. Dr. Polanco found the Claimant to be at maximum medical improvement (MMI) on January 9, 2014, and provided him with a 19% whole person impairment rating.

4. Dr. Polanco assigned Claimant work restrictions of 15 pounds lifting and carrying and 40 pounds pushing and pulling.

5. Claimant completed a Functional Capacity Evaluation on November 27, 2013. A report was prepared outlining Claimant's demonstrated capabilities following that evaluation. The report provides as follows: "Patient displayed lifting/carrying capacities between sedentary and sedentary light on this date."

6. Claimant underwent a Division IME with John Ogrodnick, M.D., on June 19, 2014. Dr Ogrodnick agreed that Claimant was at MMI. Dr. Ogrodnick assigned 19% whole person impairment. Claimant uses a stationary bike, participates in a home exercise program and takes medications to maintain his current condition. Currently Claimant takes Narco, Lyrica and a "muscle relaxant", which he takes at night, on a regular basis. Claimant testified that he experiences side effects from his medications to include drowsiness and moodiness. According to Dr. Polanco at the time of his deposition, Claimant did not meet the medical treatment guidelines criteria of prescribing for Narco. Consequently, Dr. Polanco testified that weaning to meet the guidelines was being considered at the time of his deposition.

7. Tim Shanahan performed a vocational evaluation of Claimant at Respondents' request. Mr. Shanahan provided a report dated September 26, 2014. Based upon Claimant's FCE results and the physical restrictions assigned by Dr. Polanco (15 pounds lifting/carrying and 40 pounds pushing/pulling), Mr. Shanahan opined that employment opportunities existed for Claimant in the following positions: cashier, motel/hotel clerk, customer service representative, reservationist, dispatcher, security guard, and light industrial packaging and assembly. Mr. Shanahan concluded that Claimant is capable of performing the aforementioned positions and retained the ability to earn wages.

8. Mr. Shanahan testified consistently with his report; however, he agreed that those individuals possessing high school diplomas competing for jobs with Claimant would have an advantage over the him. Nonetheless, Mr. Shanahan testified that while it would not be easy for Claimant to get a job with his educational background, he still believed Claimant was capable of obtaining work.

9. Dr. Polanco was presented with a list of job descriptions provided by Mr. Shanahan, which included an assembler, cashier, courier, customer service representative/customer complaint clerk, dispatcher, hotel/motel clerk, hotel reservation clerk, information clerk, night auditor/clerk, customer service representative/order clerk, parking lot attendant, sort/pricer, and warehouse/record clerk. After reviewing the physical demands for each job, Dr. Polanco testified that he believed Claimant was physically capable of performing these jobs. Based upon the his review of the medical record, including the results of the FCE and his treatment of Claimant, the ALJ finds that Dr. Polanco is aware of Claimant's physical capabilities. The ALJ finds Dr. Polanco's testimony credible and persuasive.

10. Claimant retained Bruce Magnuson, M.A., for a vocational evaluation. Mr. Magnuson completed his evaluation and provided a report dated August 4, 2014. In his report Mr. Magnuson concluded: "Within a reasonable degree of vocational probability . . . Mr. Starks meets the criteria for permanent and total disability . . . and would not be capable of performing any work on a part- or full-time basis and sustain it in the regional economy." According to Mr. Magnuson, Claimant's limited education combined with significant physical limitation precludes work. However, during cross examination, Mr. Magnuson agreed that Claimant's physical restrictions fell at the "low end" of light duty capacity. Mr. Magnuson also admitted that while it will be "very, very difficult," he did not know if it was "impossible" for Claimant to obtain employment. Based on evidentiary record as a whole, the ALJ finds the opinions of Mr. Shanahan more convincing than the contrary opinions of Mr. Magnuson.

11. Claimant's date of birth is October 22, 1960, making him 54 years of age. He does not have a high school diploma having completed the 11th grade. Claimant has not obtained a GED but did serve in the U.S. Army for 7 ½ years attaining the rank of sergeant. He was honorably discharged. He has a valid Colorado driver's license and does drive.

12. Claimant has past employment experience as a janitor, commercial floor technician, stocker, and cold storage warehouseman. Claimant has worked for Employer for approximately 15 years in the positions of "case picker", "put away driver" and "fork lift operator." Claimant's past job positions required frequent bending, lifting and carrying. Based upon Claimant's testimony, the ALJ finds Claimant's prior jobs physically demanding. Claimant last worked for Employer on or about April 29, 2013. Based upon the evidence presented, the ALJ finds that Claimant is probably precluded from returning to his former occupation and similar positions he has held in the past.

13. Claimant testified that he has no formal computer skills. However, the ALJ finds from his testimony that he is able to get on line and maintain a Facebook page. Claimant also has familiarity with the tasks necessary to operate a computerized inventory system, having worked with such a system in the past while working for Employer. While Claimant has not had to complete substantial data entry, the ALJ finds that he has a basic working understanding of computers and a proven capacity to learn specific computer tasks.

14. Claimant testified that he applied for jobs identified by Mr. Shanahan but was unable to get past the on-line application procedure. According to Claimant, he needed his wife to assist with the on-line applications and at times was stopped in the application process because he did not have a high school diploma. Thus, he did not meet the minimum qualifications for the identified position. The ALJ finds Claimant's effort to complete some on-line applications to constitute a rudimentary job search only.

15. The ALJ credits the report and testimony of Mr. Shanahan to find that the representative sampling of sedentary to light sedentary positions he identified present a number of prospective job positions existing in the local labor market, which afford Claimant the opportunity to earn a wage. Based on the evidence presented, including the report and testimony of Mr. Shanahan, the ALJ finds that Claimant retains the ability to earn a wage in employment reasonably available to him within his physical restrictions and commutable labor market.

16. Claimant has failed to demonstrate, by a preponderance of the evidence, that he is incapable of earning any wage in the same or other employment as a result of his April 20, 2013, work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" (hereinafter "Act") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that

which leads the trier-of-fact, after considering all of the evidence to find that a "contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979). Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S. In this case, the undersigned ALJ concludes that claimant has failed to prove, by a preponderance of the evidence, that he meets the criteria of "permanent total disability" as that term is defined under the Act.

2. Under the applicable law, a claimant is permanently and totally disabled if he/she is unable to "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In *McKinney*, the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for purposes of the statute. See *also, Christie v. Coors Transportation*, 933 P.2d 1330 (Colorado 1997).

3. Moreover, there is no requirement that Respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd., *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995). Nonetheless, when determining whether a claimant is capable of earning wages, the ALJ must consider the claimant's unique "human factors", including age, education, work experience, overall physical/mental condition, the labor market where claimant resides and the availability of work within claimant's restrictions, among other things. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). Considering the human factors involved in the instant case, the ALJ is not convinced that Claimant is incapable of earning any wages in other employment. Rather, while it is more probably true than not, that Claimant is precluded from returning to his former occupation and similar positions he held in the past, the representative sampling of sedentary to light duty type positions identified by Respondents' vocational expert as being within Claimant's physical/mental capabilities present a number of perspective job

positions existing in the local labor market affording Claimant the opportunity to earn a wage. Furthermore, the ALJ is also not convinced that Claimant's age and limited education, in combination with his physical restrictions completely preclude his ability to earn a wage. Claimant has only attempted what the undersigned finds to be a rudimentary job search. In this regard, the ALJ credits the report and testimony of Respondent's vocational expert to conclude, that while it won't be easy for Claimant to secure employment with his educational background, his prior work history and military experience will help and jobs exist which Claimant can compete for and obtain. Indeed, Claimant's own vocational expert reached a similar conclusion, testifying that while it will be "very, very difficult" he did not know if it was "impossible." As found, the ALJ credits Mr. Shanahan's testimony and written report as establishing persuasively that Claimant retains the ability to earn a wage in employment reasonably available to him within his physical restrictions and commutable labor market. Accordingly, Claimant has failed to demonstrate by a preponderance of the evidence that he is incapable of earning any wage in the same or other employment as a result of his April 20, 2013 work injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent total disability benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 12, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues to be determined by this decision are:

1. Whether the respondents have overcome the Division IME as to whether Dr. Griffis attributed the cause of the claimant's industrial injury to her pre-existing arthritis; and,

2. Whether the claimant has established by a preponderance of the evidence that the claimant is entitled to post-maximum medical improvement benefits in the form of Synvisc injections.

FINDINGS OF FACT

1. The claimant was working for respondent-employer as a Special Education Paraprofessional when she was injured her left knee on November 29, 2012 after a special education student she was working with threw a tricycle, causing her to trip over it and fall onto her knees.

2. The claimant treated with Dr. Richard Nanes at CCOM in Canon City. The work related diagnosis initially listed by Dr. Nanes was bilateral knee contusion. By the claimant's February 21, 2013 visit, the medical diagnoses were sprain to the left knee and leg, pain in the left knee with patellofemoral syndrome and contusion to the left knee. After the claimant's left knee surgery, the diagnosis of chondromalacia patella was added.

3. The claimant underwent physical therapy for her injury but it did not resolve the claimant's left knee pain, which was worsening when she saw Dr. Alex Romero on January 24, 2013. Dr. Romero gave the claimant a Kenalog injection on that date. After this injection and more physical therapy, the claimant reported her left knee had gotten much worse with a sharp pain in the anterior aspect of her knee. As Dr. Romero attempted a second cortisone injection on March 7, 2013.

4. After all conservative treatment had failed to relieve the pain in the claimant's knee she underwent left knee arthroscopy with chondroplasty of the patella

and lateral tibial plaeau, with a lateral release and removal of synovial chondromatosis. The claimant's pre- and post-operative diagnosis was left knee patellar chondromalacia with a tracking abnormality.

5. After this surgery, Dr. Romero noted that he had performed debridement of articular cartilage defects and removal of loose bodies in the left knee as well as the procedures described in his surgical notes. Despite the claimant reporting that she no longer had "the crunchy sensation in the front of her knee" she was still reporting soreness, especially if she were to overdo her daily activities.

6. Two months post surgery, the claimant was still noting anterior knee pain which was more noticeable when she was climbing stairs and kneeling, and that the pain was specifically "deep to the kneecap". The claimant's pain she was experiencing was different than she had experience prior to her surgery. Based upon these complaints, Dr. Romero recommended viscosupplementation to see if it would address the complaints.

7. On September 19, 2013, the claimant had an injection of Snyvisc-One. The injection was helpful in relieving the pain she had been experiencing since her surgery and this is noted in her next visit with Dr. Nanes on October 29, 2013.

8. On October 29, 2013, Dr. Nanes noted that he would do a rating in the next 4 weeks, that the claimant would need permanent restrictions, and that "the patient will require maintenance care and may need periodic Synvisc injections every 6 months if needed over the next 2 years."

9. During the claimant's next visit with Dr. Nanes on November 21, 2013, he placed her at maximum medical improvement, assigned an 11% left lower extremity impairment rating and stated "She does not need any further medical care or medications and has been released from our care."

10. On December 16, 2013, the respondent-insurer filed a final admission of liability admitting to an 11% scheduled impairment rating for the claimant's left lower extremity. No medical maintenance care was admitted and respondent-insurer, specifically denied "any and all liability for pre-existing and unrelated degenerative chondromalacia."

11. The claimant pursued a Division Independent Medical Examination. The exam took place with Dr. William Griffis on April 8, 2014. In his report, Dr. Griffis agreed with the claimant's authorized treatment provider, Dr. Richard Nanes, that the claimant

was at maximum medical improvement (MMI) as of November 21, 2013 and he assessed an 11% scheduled lower extremity impairment rating.

12. In his report, Dr. Griffis recommended maintenance care in the form of "up to 3 Synvisc injections over the next 18 months."

13. The respondents filed an application for hearing on April 23, 2014 with the stated issue being "Overcome the Division IME opinion of Dr. William Griffis on the issue of causation of the degenerative arthritis, if the court determines the Division IME attributed that condition to this injury; what is the true opinion of the Division IME; respondents agree with the Division IME's finding of impairment and MMI."

14. Nowhere within his report does Dr. Griffis address whether the claimant has degenerative arthritis of her left knee as a result of her industrial injury. There is no opinion issued regarding whether degenerative arthritis caused the claimant's initial injury on November 29, 2012 nor whether any type of arthritis was caused by the injury.

15. The ALJ finds that by not giving the claimant an impairment rating under Table 40 for arthritis, and by failing to so state in his report, that Dr. Griffis specifically found that the claimant's pre-existing arthritis was not caused by the claimant's industrial injury.

16. Dr. Griffis did find that Synvisc injections were helpful in relieving the pain the claimant was experiencing as a result of her industrial injury and therefore recommended maintenance care involving Synvisc injections.

17. The only significant evidence presented concerning degenerative arthritis was offered by the respondents' expert, Dr. James Lindberg. Dr. Lindberg opined that the claimant had degenerative joint disease and pre-existing osteoarthritis in her left knee and therefore any maintenance care was not necessary.

18. Neither party called Dr. Griffis as a witness.

19. The ALJ finds that the opinions of Dr. Griffis as found herein are credible and persuasive and are more credible than medical opinions to the contrary.

20. To the extent that the burden of proof may be by clear and convincing evidence, the ALJ finds, nonetheless, that the respondents have failed to establish that it is even more likely than not that Dr. Griffis attributed any of the claimant's industrial injury to her pre-existing arthritis.

21. The ALJ finds that the claimant has established that it is more likely than not that the claimant is entitled to medical maintenance care as recommended by Dr. Griffis.

CONCLUSIONS OF LAW

1. The respondents are seeking to overcome the DIME physician's opinion as to the relatedness of degenerative arthritis to the claimant's industrial injury. However, the DIME physician did not provide an opinion regarding degenerative arthritis relating to the claimant's left knee.

2. To receive workers' compensation benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence; that he or she has sustained a compensable injury proximately, caused by his or her employment. Section 8-41-301(1)(c), C.R.S. 2009; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000) ("Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded..")

3. Litigants bear a higher burden of proof when challenging opinions rendered by a DIME physician. If a DIME physician has rendered an opinion regarding MMI or medical impairment, those opinions must be overcome by clear and convincing evidence. §§ 8-42-107(8)(b)(III), -107(8)(c), C.R.S.; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482 (Colo. App. 2005) ("DIME physician's opinions concerning MMI and permanent medical impairment are given presumptive effect ... [and] are binding unless overcome by clear and convincing evidence.").

4. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P,2d 411, 414 (Colo. App. 1995).

5. The party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the DIME impairment rating or MMI finding are incorrect. *Qual-Med*, 961 P.2d at 592. A party has met the burden of establishing that a DIME impairment rating and diagnosis are incorrect if the party has demonstrated that the

evidence contradicting the DIME is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

6. Whether a party has met the burden of overcoming a DIME by clear and convincing evidence "is a question of fact for the ALJ's determination." *Metro Moving & Storage*, 914 P.2d at 414. The factual determinations of an ALJ will be upheld on review if the decision is supported by substantial evidence in the record. § 8-43-301(8), C.R.S.; *Christie v. Coors Transp. Co.*, 919 P.2d 857, 860 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997).

7. The threshold question of whether the claimant sustained any compensable injury is not at issue here. It was admitted by the respondents, who did not dispute that the claimant suffered an injury on November 29, 2012. Rather, the respondents are now contesting the nature and extent of the ensuing injuries and argued that some of the claimed conditions were not casually related to the industrial injury.

8. The respondents have not presented sufficient evidence to overcome or even clarify the opinion of the DIME physician as to the causation of the claimant's left knee injury. The only information as to causation/relatedness is that the DIME doctor found that the claimant's left knee injury was work related and his recommendation that she receive medical maintenance care in the form of 3 Synvisc injections over the next 18 months following his report demonstrated that he thought such injections would be useful for maintaining the claimant at MMI.

9. The ALJ concludes that the respondents have failed to establish by a preponderance of the evidence, let alone by clear and convincing evidence, that Dr. Griffis somehow attributed the claimant's industrial injury to the claimant's pre-existing arthritis.

10. The claimant is entitled to continuing medical benefits after MMI if the record contains substantial evidence "that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." *Grover v. Industrial Commission, supra*. The questions of whether a particular condition is related to an industrial injury, and whether a proposed treatment is reasonable and necessary, are issues of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

11. As noted by Dr. Nanes in his October 29, 2013 medical report, he believed at the time that the claimant would benefit from Synvisc injections to her left knee. The DIME physician agreed that Synvisc injections would be helpful to keep the claimant at maximum medical improvement. The claimant has met the burden of showing by a preponderance of the evidence that the recommended medical maintenance care is necessary and related to her industrial injury of November 29, 2012.

ORDER

It is therefore ordered that:

1. The respondents' challenge to the findings of the DIME physician, Dr. Griffis, is denied and dismissed.

2. The respondent-insurer shall pay for post-MMI medical maintenance care as recommended by Dr. Griffis.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 15, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

Did Claimant prove by a preponderance of the evidence that he sustained an occupational disease arising out of the course and scope of his employment?

STIPULATIONS

The parties stipulated that if this claim is determined compensable, the Health One occupational clinic closest to Denver International Airport will be Claimant's authorized treating provider.

The parties stipulated that if this claim is determined compensable, Respondents agree to reimburse Claimant for co-pays Claimant paid for the treatment of his knees during the period 05/02/2013-10/11/2013 with Greg Smith, D.O., Stephen Lindenbaum, MD, Stephen Gray, MD, Doug Hammond, MD, Rocky Mountain Family Medicine, and OccMed.

The parties stipulated that if this claim is found compensable and Claimant receives a demand for reimbursement or repayment from his health insurer asking Claimant to repay his health insurer for payments made to Greg Smith, D.O., Stephen Lindenbaum, MD, Stephen Gray, MD, Doug Hammond, MD, Rocky Mountain Family Medicine, or OccMed related to the treatment of Claimant's knees for the period 05/02/2013-10/11/2013, Respondent will either reimburse the health insurer, subject to the fee schedule, for payments the health insurer made to providers as described above or Respondents will pay the providers pursuant to the fee schedule and request that the providers reimburse the health insurer.

FINDINGS OF FACT

Based on the evidence presented at hearing the Judge finds as fact:

1. Claimant has worked as a ramp agent/baggage handler for Employer since June 1, 2010. He is currently employed with Employer doing the same job duties now as he did when first hired and has continued to work throughout the course of this case.

2. Claimant is twenty-five years of age. On May 2, 2013, Claimant was 6'3" tall and weighed approximately 245 lbs.

3. Claimant's job duties at Employer include loading luggage into aircraft bins, unloading luggage, driving luggage carts, moving luggage carts, and loading luggage carts. Claimant testified that his primary duty is loading the aircraft cargo bins with luggage and freight and during a typical shift, this duty takes about two hours per day. When working in aircraft bins, Claimant wears knee pads and moves about on his

knees. The compartment bin inside the airplane is compact (approximately four feet in height) and Claimant must move baggage weighing between a few pounds up to one hundred pounds.

4. In the first year of employment with Employer, Claimant worked extra mandatory shifts. He worked four, seventeen hour days, per week. During the extra mandatory shifts, Claimant was required to load and unload additional aircraft on numerous gates. Because of the additional shifts, Claimant was squatting and kneeling on his knees in the cargo bins more frequently and for longer periods of time.

5. About six months to a year after Claimant began working for Employer, he began to notice aching and grinding symptoms in his knees when working in aircraft bins. Claimant took ibuprofen to manage the pain. He testified at hearing that he just worked through it and thought it might go away. Claimant likes working for Employer.

6. Claimant did not report a knee injury to his employer until almost two years after his symptoms had begun because he believed the symptoms would resolve.

7. Claimant reported a work-related knee injury to the Employer on May 2, 2013 after which he was seen by authorized treating physician, Greg Smith, D.O., who, on May 2, 2013, diagnosed patella chondromalacia (softening or loss of cartilage). Claimant complained of painful grinding in both knees. On May 10, 2013, Dr. Smith revised Claimant's diagnosis to patella chondromalacia, right side greater than left. Dr. Smith checked the box on the Physician's Report of Worker's Compensation Injury affirming that his objective findings are consistent with history and/or work related mechanism of injury/illness.

8. Respondents filed a notice of contest on May 21, 2013 indicating the basis for the contest as "Injury/Illness Not Work-Related."

9. Claimant sought treatment for his knees through his personal health care providers at Rocky Mountain Family Medicine beginning on May 29, 2013 at which time he was diagnosed with "patellofemoral syndrome-probably work related" by Dr. J. Stephen Gray.

10. On August 1, 2013, Claimant was seen by Dr. Hammond at Rocky Mountain Family Medicine and Dr. Hammond referred Claimant for an orthopedic evaluation.

11. On August 1, 2013, Claimant had x-rays of his right and left knee both of which were deemed normal.

12. On August 14, 2013, Claimant treated with orthopedic specialist, Stephen Lindenbaum, MD who documented Claimant's knee pain as retropatellar pain, right more than left and assessed the knee pain as chondromalacia patella.

13. On September 7, 2013, Claimant had an MRI of his right knee. The MRI revealed full-thickness articular cartilage fissuring involving the lateral patellar facet with underlying marrow change, small reactive effusion.

14. Dr. Lindenbaum examined Claimant on September 4, 2013 and September 11, 2013. At the September 11, 2013 visit, Dr. Lindenbaum discussed surgical options with Claimant since physical therapy was not helpful for Claimant, and he discussed with Claimant that returning to full duties (at work) could aggravate his "situation."

15. Claimant returned to his personal care physicians on October 11, 2013 at which time he was evaluated by Dr. Gray who diagnosed bilateral patellofemoral syndrome-work related. Dr. Gray filled out Physician's Report of Worker's Compensation Injury and noted restrictions for Claimant of lifting no more than 50 lbs, no crawling, no kneeling, no deep squatting, and no climbing.

16. At Respondent's request, Claimant had an Independent Medical Examination by Wallace Larson, MD on February 3, 2014. Dr. Larson issued a report dated February 3, 2014 and diagnosed bilateral retropatellar knee pain. Retropatellar pain is another name for patellofemoral pain syndrome.

17. In his report, Dr. Larson opined that he did not believe that Claimant's work activities as a ramp agent caused, contributed to, or aggravated Claimant's knee problems. He noted that Claimant is not currently involved in any sports or athletic hobbies. He noted that previously, Claimant played high school football and one year of college football, and Claimant played lacrosse in high school, did shot put and discus in high school, and did fairly heavy weightlifting prior to his employment with Employer.

18. At hearing, Dr. Larson testified as an expert in Orthopedics. He is also Level II accredited. He opined that Claimant's patellofemoral pain syndrome is not caused by Claimant's work activities and that his condition is not aggravated or accelerated by work activities. Dr. Larson discussed knee structure and forces on the knee and ultimately opined that the fact that Claimant notices knee problems at work does not mean that work caused it. Dr. Larson testified that patellofemoral pain syndrome is pain that originates at the patellofemoral joint (the joint between the patella and the front of the knee) and also surrounding structures; it is generally thought to be a problem stemming from overloading or maltracking of the knee and is primarily a degenerative type of condition.

19. Dr. Larson testified that several things can cause patellofemoral pain syndrome including a genetically shallow "v" in the patellar bone. Other causes of this condition are the shape of the knee cap, maltracking of the patellar bone, excessive bodyweight, muscle imbalance, jumping sports, weightlifting/squatting, and other activities that put tremendous forces on the patellar region**.** In addition, genetic or developmental issues can cause this condition.

20. Although Dr. Larson agreed that Claimant's knees are subject to compressive forces when Claimant must squat down to get onto his knees to do aircraft bin work, he testified that in this case, the compressive forces from work activities are intermittent and would not *likely* cause or aggravate Claimant's knee

problems. (emphasis added). The ALJ views Dr. Larson's testimony as speculative and not credible.

21. Dr. Larson testified about Claimant's body mass index ("BMI") of 34 being problematic for Claimant and that when a person has a BMI over 30 or perhaps 28, there is a high incidence of knee and hip arthritis/damage. The ALJ is not persuaded that Claimant's weight is a factor here, as other treating doctors documented Claimant's weight and/or BMI and did not address the issue of Claimant's weight as a contributing factor to his bilateral knee condition.

22. Dr. Larson testified that chondromalacia is associated with patellofemoral pain syndrome. He opined that Claimant really does not exhibit signs of poor tracking but rather his condition is most likely something that developed over time with probably a triggering event such as football or weightlifting. Ultimately, Dr. Larson testified that Claimant did not suffer an acute injury, rather, his condition is due to a preexisting condition that was not caused or aggravated by work activities.

23. When he was asked about full thickness cartilage fissuring (initial stages of chondromalacia per Dr. Larson) identified in the MRI of Claimant's right knee, Dr. Larson testified that patellofemoral pain can cause cartilage damage and that the cartilage findings in Claimant's MRI suggest that the condition [patellofemoral pain syndrome] has been going on for a number of years. Dr. Larson did not specify any timeframe for the "number of years" he was referring to. Dr. Larson opined that Claimant's patellofemoral pain syndrome likely pre-existed Claimant's employment.

24. In Dr. Larson's opinion and pursuant to his testimony, each person has some anatomic or genetic predisposition, or not, to certain conditions, and in Claimant's case, "some things adding up against him." Dr. Larson mentioned football and weightlifting as factors that contributed to Claimant's knee condition. However, Dr Larson testified that even if Claimant had not done any of the aforementioned activities, he could not guarantee that Claimant would not have knee pain.

25. During cross examination by Claimant's counsel, Dr. Larson testified that certain activities were relatively inappropriate for Claimant or not advisable. Upon further questioning, Dr. Larson admitted inappropriate or inadvisable activities for Claimant would include being on his knees two hours a day in a four foot high airplane bin.

26. On cross examination, Dr. Larson agreed that Claimant's work activities of being on his knees two hours per day increased his symptomatology. He testified that Claimant "found activities that became symptomatic . . . because of his preexisting condition . . . his situation is such that if he does a lot of kneeling, he is probably going to have some pain, if he doesn't, he probably won't." Notwithstanding, Dr. Larson maintained that an increase in symptoms, or symptoms alone, does not indicate an aggravated condition. The ALJ does not agree and finds it incredible that Dr. Larson, could not or would not, recognize Claimant's job duties of kneeling/squatting in a compact cargo bin as factors that caused, contributed to, or aggravated Claimant's

knee problems especially since Dr. Larson noted in his February 3, 2014 report that "[Claimant] would probably benefit from activity modification to decrease kneeling and squatting . . . .".

27. Claimant credibly testified that prior to working for Employer; he did not have any knee problems or knee pain and never had treatment for his knees. He testified that he played football from the 6th grade through high school and one year of college. Claimant did engage in weight lifting, including squatting, in high school as well as lacrosse, shot put and discus. Claimant stopped weight training shortly after being employed with Employer due to the rigorous work schedule and physical nature of the job.

28. Dr. Larson's testimony regarding the likelihood that Claimant's patellofemoral pain syndrome likely pre-existed Claimant's employment with Employer is not persuasive. The ALJ finds there is not sufficient evidence in the record that Claimant had a preexisting knee condition to either knee. To the contrary, Claimant's credible and persuasive testimony is that he did not have knee problems or knee pain and never had treatment for his knees.

29. All of the physicians who examined Claimant, including Dr. Larson, essentially, agree that the diagnosis for Claimant's knees is patellofemoral pain syndrome. Dr. Gray attributed the patellofemoral pain syndrome to Claimant's work activities. Dr. Lindenbaum recognized that Claimant's return to full duties (at work) could aggravate his "situation."

30. Although the ALJ credits Dr. Larson's testimony that Claimant's bilateral knee condition is most likely something that developed over time with probably a triggering event, the ALJ finds that the timeframe in which Claimant worked for Employer before reporting the symptoms/injury fits within the non-specific timeframe described by Dr. Larson, especially considering that Claimant's first year of employment was equivalent to working approximately 1.7 jobs and compressed the timeframe for an occupational disease to become problematic and/or obvious.

31. The ALJ finds there were triggering events and a direct cause for Claimant's occupational disease. Claimant's work related activities of moving about on his knees, in a kneeling and/or squatting position, in a compact cargo bin while lifting baggage and freight of varying weights were the triggering events-not regarding aggravating a preexisting condition but pertaining to the onset of the occupational disease. Additionally, the ALJ finds that Claimant's excessive work schedule and duties in the first year of employment with Employer are the direct and proximate cause of the bilateral knee injury; Claimant's continued employment, with exposure to the same work duties, further acted to aggravate the injury and symptomatology to Claimant's knees resulting in an occupational disease.

32. Claimant credibly testified that he discontinued weight training shortly after being employed with Employer. Claimant's Answers to Interrogatories indicate that Claimant did not engage in any kneeling activities outside of work. Thus, the ALJ finds

that Claimant was not exposed to kneeling activities that could potentially aggravate his knees outside of the employment activities.

33. Claimant has proven that it is more probably true than not that he suffered a compensable industrial injury/ occupational disease to both knees while in the course and scope of his job duties that included repetitive activities as a ramp agent/baggage handler for Employer. The ALJ reaches this conclusion based on the credible, persuasive testimony of the Claimant as well as the opinions of Dr. Smith, Dr. Gray and Dr. Lindenbaum. The ALJ is not persuaded by Dr. Larson's contrary testimony and in particular, finds that Dr. Larson's testimony at hearing somewhat supports the finding that Claimant suffered an occupational disease due to his work activities as a ramp agent/baggage handler for Employer. There was no credible or persuasive evidence that Claimant's bilateral knee issues were caused by a hazard he was equally exposed to outside his work at Employer.

34. In light of the compensability findings, the Stipulations of the parties, as noted herein, are adopted by the Court.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Id.*

5. An accident “arises out of” employment when there is a causal connection between the work conditions and the injury. *In re Question Submitted by the United States Court of Appeals for the Tenth Circuit,* 759 P.2d 17 (Colo. 1988). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996).

6. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

7. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An “occupational disease” means disease which results directly from the employment of the conditions under which work was performed, which can be seen to have followed as a natural incident of the work, and as a result of the exposure occasioned by the nature of the employment, and which be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would been equally exposed outside of the employment. C.R.S. § 8-40-201(14). A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant’s employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999).

8. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009).

9. In deciding whether the Claimant has met his burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from

the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

10. As a matter of law, medical evidence is not required to establish causation, although it is a factor that may be considered in addressing that determination. See *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983).

11. As found, Claimant has established by a preponderance of the evidence that while in the course and scope of his employment he first began having knee pain/grinding and suffered an occupational disease while in the course and scope of his employment. Claimant first reported the injury on May 2, 2013 and credibly testified that his symptoms began within six to twelve months after starting employment with Employer on June 1, 2010.

12. Dr. Larson's testimony regarding that Claimant's patellofemoral pain syndrome likely pre-existed Claimant's employment with Employer is not persuasive. As found, there is not sufficient evidence in the record that Claimant had a preexisting knee condition to either knee. To the contrary, Claimant's credible and persuasive testimony is that he did not have knee problems or knee pain and never had treatment for his knees. All of the physicians who examined Claimant, including Dr. Larson, essentially, agree that the diagnosis for Claimant's knees is patellofemoral pain syndrome. Dr. Gray attributed the patellofemoral pain syndrome to Claimant's work activities. Dr. Lindenbaum recognized that Claimant's return to full duties (at work) could aggravate his "situation."

13. As found, the timeframe in which Claimant worked for Employer before first reporting the symptoms/injury fits within the non-specific timeframe described by Dr. Larson for a knee condition to develop, especially considering that Claimant's first year of employment was equivalent to working approximately 1.7 jobs and compressed the timeframe for an occupational disease to become problematic and/or obvious. As found, the triggering events were Claimant's work related activities of moving about on his knees, in a kneeling and/or squatting position, in a compact cargo bin while lifting baggage and freight of varying weights. Additionally, the ALJ finds that Claimant's excessive work schedule and duties in the first year of employment with Employer are the direct and proximate cause of the bilateral knee injury; Claimant's continued employment, with exposure to the same work duties, further acted to accelerate and aggravate the injury and symptomatology to Claimant's knees resulting in an occupational disease. Claimant had no other kneeling exposure to his knees outside of his employment with Employer.

14. If there is a compensable injury, the employer and its insurance carrier must provide all medical benefits, which are reasonably necessary to cure and relieve the work-related injury. C.R.S. §8-42-101; *Owens v. Industrial Claim Appeals Office of the State of Colo.,* 49 P.3d 1187, 1188 (Colo. App. 2002). To be a compensable benefit, the medical care and treatment must be causally related to a work injury. *Snyder v. Industrial Claim Appeals Office of the State of Colo.,* 942 P.2d 1337, 1339

(Colo. App. 1997). The right to medical benefits arises only when an injured worker establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. *Id.* The question of whether a Claimant has proven by a preponderance of the evidence that a contested medical treatment is reasonably necessary is one of fact for the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496, 498 (Colo. App. 1997). Here, Claimant's work-related injury/occupational disease is compensable as established by a preponderance of the evidence. Respondents, however, retain the right to dispute liability for specific medical treatment on grounds the treatment is not authorized or reasonably necessary to cure or relieve the effects of the industrial injury. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Williams v. Industrial Commission*, 723 P.2d 749 (Colo. App. 1986).

15. The Stipulations of the parties, as noted herein, are adopted by the Court.

ORDER

It is therefore ordered that:

a. As proven by a preponderance of the evidence, Claimant suffered a compensable work related occupational disease to both of his knees while in the course and scope of his employment as a ramp agent/baggage handler for Employer.

b. Respondents are liable for the medical care Claimant receives/received from authorized providers which is/was reasonably necessary to cure and relieve Claimant from the affects of his occupational disease reported on May 2, 2013.

c. The Stipulations of the parties, as noted herein, are adopted by the Court.

d. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 16, 2015

Sara L. Oliver
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

ISSUES

The issue addressed in this decision concerns Claimant's entitlement to medical benefits. The specific question presented is whether a total left knee arthroplasty (i.e. total knee replacement surgery) requested by Dr. Purcell is reasonable, necessary, and related to Claimant's July 14, 2013 compensable injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant injured her left knee while working at Sonic Drive-In when she slipped on a tile floor on July 14, 2013. Despite wearing "anti-slip" shoes, excess water on the floor caused Claimant to lose her footing and twist her left knee feeling a "pop" in the process. Claimant completed her shift in pain and waited a week before she sought care through the emergency room (ER) at Penrose-St. Francis on July 21, 2013 for pain and swelling.

2. While in the ER, x-rays of the left knee were obtained which demonstrated compartmental osteoarthritis and a "possible ossified intra-articular body in the posterior knee." Claimant was diagnosed with "left knee sprain" and provided with a knee immobilizer and crutches. She was instructed to follow-up with her "regular doctor or Orthopedics" the following week.

3. On August 19, 2013 Claimant presented to the ER at Memorial Hospital after she twisted her left knee while at home. Claimant reported her history of injury to the knee while at work earlier in the summer, reported use of a knee brace and denied direct trauma to the knee during this encounter. Claimant was diagnosed with "acute exacerbation of chronic knee pain", given a prescription for Percocet and provided with an orthopedic referral. She was then discharged from the ER.

4. Claimant was evaluated by Dr. Derek Purcell on August 22, 2013. Dr. Purcell is an Orthopedist. Dr. Purcell reported Claimant's injury and treatment history noting specifically that Claimant denied "pervious problems" with her knee prior to July 14, 2013 injury. Following examination and review of Claimant's x-rays, Dr. Purcell reached the following impressions: 1. Left knee patellofemoral osteoarthritis; mild. 2. Left Knee possible loose body. 3. Left knee medial meniscus tear.

5. Dr. Purcell recommended MRI which was completed August 23, 2013. MRI

demonstrated “severe patellofemoral compartment osteoarthritis, moderate medial and mild to moderate lateral compartment osteoarthritis, degenerative fraying of both menisci without acute tear, intact knee ligaments and moderate knee joint effusion with extensive synovitis.

6. In follow-up with Dr. Purcell on September 10, 2013, Dr. Purcell and Claimant discussed the results of her MRI. Dr. Purcell noted that Claimant had “severe patellofemoral osteoarthritis with full-thickness cartilage loss” along with “high-grade cartilage loss in the medical compartment” of the left knee and some “mild extrusion of both the lateral and medial meniscus.” Conservative treatment measures were talked about including administration of corticosteroids and viscosupplementation after which Dr. Purcell gave Claimant a steroid injection into the left knee.

7. On October 31, 2013, Dr. Purcell administrated a second steroid injection and raised the potential for a “total-knee arthroplasty” should further conservative treatment measures fail.

8. Respondents filed a “med only” general admission of liability on March 21, 2014. In an attached stipulation to the general admission of liability dated March 12, 2014, Respondents’ agreed to a follow-up appointment between Claimant and Dr. Purcell.

9. Pursuant to the parties’ March 12, 2014 stipulation, Claimant returned for additional evaluation with Dr. Purcell on March 20, 2014. At this visit, Dr. Purcell recommended viscosupplementation injections. Overall, Claimant was provided three Orthovisc injections. This treatment did not provide lasting relief resulting in Dr. Purcell making a recommendation for total knee arthroplasty.

10. On June 12, 2014, Dr. Purcell’s office submitted, to the Insurer’s third party administrator, Gallagher Bassett Services, a “Surgery Authorization Request” for a left total knee arthroplasty. Respondents denied the request.

11. On June 22, 2014 Dr. Wallace Larson completed a WCRP Rule 16 records review of in support of Respondents’ denial of the requested left total knee arthroplasty. (Claimant’s Exh. pg. 196-197). In his report outlining Claimant’s medical records, Dr. Larson indicates that while Claimant is an “appropriate candidate for total left knee arthroplasty”, her need for surgery is not reasonably necessary or causally related to Claimant’s July 14, 2013 industrial injury. To the contrary, it is Dr. Larson opinion that Claimant’s need for surgery is the “result of the natural progression of a pre-existing condition”, specifically degenerative osteoarthritis.

12. Despite the reference in Dr. Purcell’s August 22, 2013 record that Claimant had no “previous problems” concerning her left knee, she testified to a remote history of “scope” surgery to both knees approximately 24 years prior to July 14, 2013. Claimant testified that she simply forgot this history when discussing her condition with Dr. Purcell. Respondents submitted medical records referencing Claimant’s prior surgical history and a motor vehicle accident occurring February 9, 2011, wherein Claimant

injured her left knee. Nonetheless, after careful review of the entire medical record, the ALJ finds no evidence to suggest that Claimant's left knee was symptomatic, that she was actively engaged in ongoing treatment for her left knee or that her left knee was functionally limiting prior to July 14, 2013. Consequently, the ALJ finds Claimant's July 14, 2013 injury caused Claimant's subsequent need for treatment.

13. Claimant testified that immediately prior to her July 14, 2013 injury she was neither taking medication nor was she getting treatment for her left knee. According to Claimant, the condition of her left knee did not limit her prior to her July 14, 2013 injury. She was able to walk her dogs, walk around at the flea market and never missed work. Since her July 14, 2013 injury, Claimant testified that she has good days and bad days. Although she has been able to work despite pain, Claimant is unable to sleep more than 2-3 hours per night and "can't really do what she used to." Dr. Purcell's medical records outline her difficulty with "stairs, steps, squatting, and bent-knee activities" as well as "prolonged standing" due to pain. On June 10, 2014 Claimant tearfully reported to Dr. Purcell that she was having "significant disfunction (sic) with simple activities of daily living, including prolonged standing or walking." The ALJ credits Claimant's testimony regarding the condition and function of her left knee pre and post injury to find that prior to July 14, 2013, Claimant's left knee was asymptomatic and that she was able to work full duty without limitations in the left knee caused by her pre-existing osteoarthritis. Based upon her testimony, the ALJ finds that Claimant has not returned to her previous baseline level of function despite significant conservative care.

14. The Lower Extremity Injury Medical Treatment Guidelines (Guidelines), Rule 17, Exhibit 6 was admitted into evidence. Regarding aggravated knee osteoarthritis the Guidelines provide the following:

i. Description/Definition: Swelling and/or pain in a joint due to an aggravating activity in a patient with pre-existing degenerative change in a joint.

ii. Occupational Relationship: The provider must establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to physical activities such as repetitive kneeling or squatting and climbing, or heavy lifting.

Other causative factors to consider-Previous meniscus or ACL damage may predispose a joint to degenerative changes. In order to entertain previous trauma as a cause, the patient should have medical documentation of the following: menisectomy; hemiarthrosis at the time of the original injury; or evidence of MRI or arthroscopic meniscus or ACL damage. The prior injury should have been at least 2 years from the presentation for the new complaints and there should be a significant increase of pathology on the affected side in comparison to the

original imaging or operative reports and/or the opposite un-injured side or extremity.

15. Dr. Purcell testified by deposition that he is not Level II accredited and also that he was not familiar with the workers' compensation medical treatment guidelines. (Purcell depo, p. 13) Nevertheless, the ALJ finds Dr. Purcell to be an expert in orthopedic surgery.

16. Dr. Purcell testified that the high-grade chondroidal (sic) fissures noted on Claimant's MRI are seen in the presence of osteoarthritis and are not indicative of injury to the knee. (Purcell depo, p. 8) However, Dr. Purcell testified that the effusion in Claimant's knee would suggest an exacerbation of her osteoarthritis. (Id.) Consequently, Dr. Purcell testified that the work related injury exacerbated Claimant's underlying arthritis. (Purcell depo, pp. 19 and 20)

17. Consistent with the opinion of Dr. Larson, Dr. Purcell testified that the recommended surgery is reasonable and necessary. (Purcell depo, p. 20) Based upon the opinions of Dr. Larson and Dr. Purcell, the ALJ finds that the recommended total knee arthroplasty is reasonable and necessary.

18. Dr. Purcell testified that Claimant did not tell him about any prior surgery to her left knee which would be a relevant factor in trying to determine the relatedness of the surgery to her July 14, 2013 injury as "previous surgery would increase the likelihood of having problems with the left knee. (Purcell depo, p. 22) The evidentiary record indicates only that Claimant had surgery to her knees bilaterally. There is no reference to what structures of the knee prior surgery was directed to and/or the extent of injury to those structures. Dr. Larson similarly had no specific information regarding the nature and extent of Claimant's prior knee surgery. Based upon the evidence presented, the ALJ finds the impact that Claimant's prior injury/surgery may have had on the condition of her left knee and its causative role in the subsequent aggravation of her osteoarthritis to be unknown. Accordingly, the ALJ is not convinced that prior trauma/surgery played a causative role in the aggravation of Claimant's pre-existing osteoarthritis as contemplated by the Guidelines referenced above. The ALJ finds Dr. Larson's contrary opinions unpursuasive.

19. Dr. Purcell testified that the Claimant did not tell him about the automobile accident she had in February, 2011 in which she injured her knee. (Purcell depo, p. 22). Dr. Purcell testified that the incident the Claimant had on August 19, 2013 would not have changed the level of arthritis in her knee and he agreed that the amount of osteoarthritis would not have changed from the incident of July 14, 2013. According to Dr. Purcell, the August 19, 2013 incident, wherein Claimant twisted her knee at home would only constitute "an increase in the symptoms that where already there. Dr. Purcell testified that he would not be able to separate the effusion or swelling that she had between the time of the MRI and the two incidents where she injured her knee on July 14th and August 19th. (Purcell depo, p. 24).

20. The ALJ finds, based upon the evidence presented, that but for the activation of

symptoms in the left knee on July 14, 2013, Claimant likely would not have subsequently twisted this knee while getting around her home. Consequently, the ALJ finds that Respondent's have failed to establish, by a preponderance of the evidence, that Claimant suffered an "intervening injury" which would sever the causal relationship between Claimant's July 14, 2013 work injury and her need for a left total knee arthroplasty.

21. Dr. Purcell testified that the knee replacement surgery was to address the cartilage loss and the osteoarthritis. He agreed that the osteoarthritis was present prior to July 14, 2013. (Purcell depo, p. 25).

22. In analyzing whether Claimant engaged in any of the activities listed under Rule 17 which would serve to establish part of the relationship between her work activities and aggravation of her osteoarthritis, including repetitive kneeling, squatting, crawling, climbing or heavy lifting, Dr. Purcell testified that Claimant simply did not mention that activity as part of her job. (Purcell depo, pp. 25 and 26). Based upon the testimony of Dr. Purcell, the ALJ finds it unclear whether any discussion was had between Claimant and Dr. Purcell regarding the nature and extent of the physical activities required to perform Claimant's job duties. Consequently, the ALJ finds Respondents' suggestion that Claimant did not engage in such activities speculative and unsupported.

23. Dr. Larson testified that the arthritis in the Claimant's knee was there prior to her [work] incident (Larson depo, p. 9). Dr. Larson testified that the need for surgery has not met the recommendation under the medical treatment guidelines and he did not see any reason why this case should be an exception to the medical treatment guidelines (Larson depo, pp. 9 and 10). Dr. Larson testified: "I don't think she had an aggravation I think we are just dealing with osteoarthritis." He went on to state "I don't think she had any structural change in her knee as a result of her occupational exposure, no, I don't." (Larson depo, p. 18)

24. During his deposition testimony, Dr. Larson testified that prior to July 14, 2013, Claimant's baseline condition was simply "osteoarthritis of her knee." Dr. Larson admitted that he had no medical reports to establish the presence of swelling or medial joint line tenderness. Although he opined that the high grade chondral fissures present on MRI would have been present prior to July 14, 2013, Dr. Larson admitted that such tears can occur in the face of acute injury and that he had no previous imaging studies to compare with the August 23, 2013 MRI. Consequently, the ALJ finds there is no way to determine the nature and extent of chondral fissuring prior to August 23, 2013. While the ALJ is persuaded that Claimant had severe osteoarthritis in her left knee, with likely chondral fissuring prior to July 14, 2013, the totality of the evidence presented convinces the ALJ that this arthritis was asymptomatic and non-limiting. Even Dr. Larson, who had ample opportunity to detail the "baseline condition" of Claimant's left knee including probable limitation(s) therein given the degree of degenerative change demonstrated on MRI, elected to characterize it only as "osteoarthritis of her knee."

25. The ALJ finds that more likely than not, Claimant aggravated her previously

asymptomatic osteoarthritis on July 14, 2013 when she slipped on a wet floor twisting her left knee in the process. The undersigned finds that conservative treatment measures have failed and that Claimant's current need for a total knee arthroplasty flows proximately and naturally from the July 14, 2013 injury.

26. Claimant has proven by a preponderance of the evidence that she suffered a change in the baseline condition of her left knee as a direct consequence of her work duties. Consequently, the ALJ finds that Claimant has proven, by a preponderance of the evidence, that there is an occupational relationship between her aggravated left knee osteoarthritis and her need for a total knee arthroplasty. Claimant's need for a left total knee arthroplasty is related to her July 14, 2013 work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo.App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo.App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony is generally consistent with the content of the medical records. Consequently, the ALJ finds Claimant to be a credible and persuasive witness.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

Medical Benefits

D. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of the his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As found here, Claimant has proven by a preponderance of the evidence that she sustained a compensable aggravation of her previously asymptomatic left knee osteoarthritis and that this aggravation is the proximate cause of Claimant's need for medical treatment, including her need for a total left knee arthroplasty. While it is true that none of the reports of Dr. Purcell specifically state that the recommended knee surgery is related to the incident of July 14, 2013, Dr. Purcell testified that the July 14, 2013 incident exacerbated her osteoarthritis and his reports outline Claimant's functional decline in the face of failed conservative treatment. Taken in its entirety, the ALJ finds that the evidentiary record contains substantial evidence to support a conclusion that Claimant's work duties and not a prior injury/surgery caused a change in the baseline level of her left knee, i.e. from asymptomatic to symptomatic directly resulting in her need for a total knee arthroplasty.

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses to cure and relieve Claimant from the effects of her left knee condition, including, but not limited to the left total knee arthroplasty as requested by Dr. Derek B. Purcell.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 21, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

The issues presented for determination are:

- Whether the Respondents have overcome the Division Independent Medical Examination (DIME) physician's opinion, by clear and convincing evidence, regarding a sixteen percent whole person permanent physical impairment rating for Claimant?

- Subsequent to a Final Admission of Liability and Respondents' admission to post-maximum medical improvement (MMI) medical benefits; whether Respondents have proven by a preponderance of the evidence that Claimant is not entitled to an award of medical benefits post-MMI to maintain his condition at MMI?

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as fact:

1. Claimant is a 29-year old man, with a May 5, 1985, date of birth.

2. Claimant was injured in the course and scope of his employment with the Employer on March 23, 2013, when he was hit in the neck and upper back by a tire that dropped from approximately eight to twelve feet above him.

3. On March 23, 2013, Claimant sought treatment at St. Anthony's Hospital Emergency Room, where his initial complaints in Triage as noted by a nurse, were neck and back pain, and numbness to bilateral fingers and feet with improvement when lying down. By the time Claimant saw the Emergency Room doctor, medical records documented that his chief complaint was back pain. The records note that Claimant complained of mild, dull pain to his lower neck and upper back without radiating pain. The numbness in his hands had resolved but the numbness in his feet had not resolved.

4. On March 23, 2013, CT scans of the cervical, thoracic and lumbar spine were obtained. All studies were read as showing no evidence of acute pathology. There were no neurological symptoms noted. Claimant was reported to have active prescriptions of oxycodone and hydrocodone, but the cause for the narcotics is not noted. Examination of the neck was "supple" with "mild paraspinous tenderness to palpation near the lower neck/upper thoracic area." Extremities were symmetric with full range of motion. Claimant was discharged home, to follow up with his personal physician

5. Claimant selected HealthOne Occupational Medicine as the provider designated to treat his work injuries. Dr. Dave Hnida first evaluated Claimant on March 25, 2013.

Dr. Hnida's notes reflect that Claimant reported pain at a level 4/10 to 5/10. Claimant's past medical history was positive for migraine headaches. In reviewing Claimant's symptoms, Dr. Hnida noted the only neurological symptom "may be the occasional tingling sensation to the right foot, which is not readily reproducible". Dr. Hnida's impression was contusion to the neck and upper back. Dr. Hnida re-ordered CT scans of Claimant's cervical and thoracic spine. Dr. Hnida kept Claimant off work pending the results of the diagnostic studies.

6. On March 26, 2013, Claimant returned to HealthOne where he was evaluated by Dr. David Orgel. As before, the CT scans were read as normal, except for a non-work related thyroid nodule. Dr. Orgel indicated, "although he has painful range of motion, it is actually pretty well maintained with most of his pain with rotation, very little with flexion, and only mildly worse with extension. Dr. Orgel assessed Claimant with cervical and thoracic strain and prescribed Flexeril, Ibuprofen and physical therapy and released Claimant to return work with restrictions of limited lifting and limited overhead work.

7. On March 29, 2013, Claimant was seen at HealthOne for a physical therapy evaluation. Dizziness was documented as a subjective complaint for Claimant.

8. Claimant continued treating with HealthOne and its referrals. On April 2, 2013, Dr. Orgel evaluated Claimant and documented "mildly reduced rotation to the left, mildly positive Spurling maneuver with pain in a C5 distribution. There is otherwise no cervical spine tenderness. . . ."

9. On April 5, 2013, Dr. Hnida evaluated Claimant on a walk-in basis. Claimant complained of continuing pain in the neck with radiation along the right-greater-than-left trapezius extending out to both shoulders. Claimant also discussed that he noticed some swelling in his hand, as well as some altered sensations in the fingertips.

10. On April 10, 2013, Claimant returned to HealthOne and was evaluated by Dr. George Kohake. The medical records note that Claimant "is now complaining of dizziness at times." His main symptoms were of upper back and neck pain with tight neck muscles.

11. On April 24, 2013, Claimant saw Dr. Orgel, who noted that Claimant's progressive symptoms of dizziness one month after injury "is unusual." Dr. Orgel ordered an MRI of Claimant's brain. Dr. Orgel also referred to Claimant to a neurologist, Dr. Samuel Chan. The MRI of the brain was normal.

12. On May 2, 2013, Dr. Chan evaluated Claimant. Claimant reported, "dizziness, shacki (*sic*) vision, severe headaches, back pain, neck mussles *(sic),* right leg giving up mid-walk. On physical exam, Dr. Chan reported axial loading and truncal rotations slightly exacerbated the pain complaint. Claimant reported tenderness with flexion of the cervical spine. There was no tenderness with extension or rotation of the cervical spine. Dr. Chan noted the diagnostics failed to show any significant permanent pathology. He opined, "The concern is the patient's description of diffuse and vague symptoms". Dr. Chan determined that, neurologically, Claimant was found to be within

normal limits. Dr. Chan did administer bilateral greater and lesser occipital nerve injections.

13. On May 7, 2013, Claimant returned to Dr. Orgel and reported a worsening of his headaches following the injections.

14. On a June 11, 2013 physical exam, Dr. Hnida noted that Claimant had full range of cervical motion. His assessment was ongoing neck pain with subjective complaints of dizziness.

15. On June 20, 2013, Dr. Chan re-evaluated Claimant. Dr. Chan noted a "slightly limited" cervical spine range of motion due to "subjective complaints of pain". Dr. Chan opined, "It is unclear why the patient continues to be symptomatic". He recommended an active exercise program and ordered cervical and thoracic spine MRIs. The cervical and thoracic spine MRIs were performed on June 24, 2013. The thoracic MRI was read as normal. The cervical MRI was read as showing only minimal changes of degenerative disc disease.

16. Dr. Chan performed EMG testing of the right upper extremity on August 1, 2013. As with all other tests, this diagnostic was also read as normal.

17. As part of his treatment for the industrial injury, Claimant was referred for physical therapy, massage, chiropractic, acupuncture, and occipital injections. Claimant was treated with multiple medications. None of the treatment provided Claimant any sufficient benefit.

18. On August 21, 2013, Dr. Chan performed a Functional Capacity Evaluation (FCE) and placed Claimant at MMI and assigned four percent whole person impairment per Table 53(II)(B) and three percent whole person impairment for loss of range of cervical motion. The combined impairment totaled seven percent whole person. Dr. Chan did not recommend medical treatment post-MMI to maintain the Claimant's condition at MMI.

19. On August 22, 2013, Dr. Hnida evaluated Claimant and agreed that Claimant was at MMI. Dr. Hnida opined no maintenance care after MMI is required.

20. On September 19, 2013, Respondents filed a Final Admission of Liability consistent with Dr. Chan's opinions on MMI and impairment, but admitted liability for medical treatment post-MMI.

21. On October 16, 2013, Claimant objected to the Final Admission of Liability and requested a DIME. Dr. Velma Campbell was selected as the Division Examiner.

22. On January 23, 2014, Dr. Campbell performed the DIME and generated a report. Her report notes that the last page of the record reviewed was a July 7, 2013 medical record from a visit with Dr. Chan.

23. Dr. Campbell agreed that Claimant reached MMI on August 21, 2013, but found that Claimant suffered sixteen percent permanent physical impairment as a result of the industrial injury.

24. Dr. Campbell assigned five percent permanent physical impairment for loss of range of cervical motion, four percent permanent physical impairment per Table 53(2)(B) for the cervical spine condition, and three percent impairment per Table 5 for injury to the greater occipital nerve. Dr. Campbell's total combined spinal impairment was twelve percent whole person permanent physical impairment. Dr. Campbell then assigned an additional five percent whole person impairment for vestibular disequilibrium, for a total combined impairment of 16 percent whole person.

25. Dr. Campbell was aware that the prior combined impairment rating by Dr. Chan totaled seven percent whole person.

26. Additionally, Dr. Campbell recommended maintenance medical care and identified a home electronic stimulation unit as helpful to Claimant; Claimant previously used a muscle stimulation machine while seeing Dr. Chan and had a transient decrease in pain.

27. Dr. Campbell also stated that medications as directed by Dr. Chan would be appropriate, especially if they minimize the need for opiates. She noted that chiropractic, massage, acupuncture, and physical therapy did not provide sufficient or even temporary subjective benefit for Claimant's symptoms, therefore, Dr. Campbell did not recommend a routine provision of those therapies, but did recommend that those therapies may be useful for occasional exacerbations.

28. Finally, Dr. Campbell, recommended that maintenance medical care continue for Claimant until Claimant has not needed medical care for at least six consecutive months.

29. Dr. Campbell noted that Claimant described his headaches post- industrial injury as different and more frequent than the migraines he suffered pre-industrial injury. Dr. Campbell assessed Claimant with cervicogenic/occipital headaches with migraine features, cervical vertigo, and chronic cervicothoracic myofascial dysfunction pertaining to the complications of the cervical contusion/sprain. Dr. Campbell noted Claimant's history of significant contusion and strain to the cervical and cervicothoracic region. She noted that physical therapy was not able to progress rapidly because of the dizziness and nausea with head and trunk motions.

30. Dr. Campbell rated Claimant's headaches according to occipital nerve impairment rather than the central nervous system due to, in her opinion, the stronger association with the cervicogenic mechanism of the headache than with a brain injury.

31. Dr. Campbell determined that the dizziness and vertigo as described by Claimant do continue to appear in the record after they first appear, and are also

consistent with cervical or cervicogenic vertigo. She noted this determination is supported by the absent Dix-Hallpike sign and some of the positional factors. Dr. Campbell wrote that the vertigo/disequilibrium is intermittent and interrupts Claimant's activities intermittently, and therefore does not prevent Claimant from engaging in the activities of daily living. However, Dr. Campbell noted there are some activities that Claimant should not perform at work due to the potential for unpredictable loss of balance.

32. Dr. Campbell found permanent partial impairment due to the conditions related to the March 23, 2013 industrial injury. She noted that the conditions include chronic cervical spine strain with spasm and myofascial pain due to the cervicothoracic contusion and strain, posttraumatic headaches with migraine features associated with occipital trigger points.

33. On April 23, 2014, Respondents filed a second Final Admission of Liability admitting to post-MMI medical benefits that are medically, reasonable, necessary, and related to the industrial injury of March 23, 2013; based on the report of Dr. Hnida dated August 22, 2013 and the report of Dr. Chan dated August 21, 2013. Respondents also awarded Claimant a permanent disability award consistent with the impairment rating and DIME report of Dr. Campbell.

34. On May 23, 2014, Claimant objected to the April 23, 2014 Final Admission of Liability and filed an application for hearing on the issues of average weekly wage, temporary total benefits, temporary partial benefits, permanent partial benefits, and overcoming the determination that Claimant had reached MMI.

35. At a pre-hearing conference on November 5, 2014, Claimant sought to withdraw the issues listed on his Application for Hearing dated May 23, 2014, including, overcoming the DIME. PALJ Clisham ordered that Claimant's issues on the May 23, 2014 Application for Hearing were stricken, without prejudice.

36. In their response to Claimant's application for hearing, Respondents endorsed the issues of medical benefits, reasonably necessary, permanent partial disability benefits, and "[o]vercoming opinions of DIME on issue of permanent physical impairment apportionment."

37. On July 21, 2014, Dr. Tashof Bernton performed an IME at the Respondents' request. In connection with his IME, Dr. Bernton performed psychological testing, Battery for Health Improvement 2. This test evaluates the presence of psychological factors when a person complains of chronic pain. Based on the results of the psychological testing, Dr. Bernton generated a report and opined, "Clinicians should take care to make decisions based upon objective findings, as subjective complaints are not likely to be a reliable guide to physically based pain generators. . . . In any case, with the high perseverance scale, this is an individual whose complaints are likely to persist even in the absence of physiologic basis and clinicians should take that into account in assessing and treating his complaints."

38. In his report, Dr. Bernton opined that the findings on psychological testing are consistent with either a strong somatoform (psychologically-based) contribution to the Claimant's pain presentation or possibly to some misrepresentation.

39. At hearing, Dr. Bernton testified as an expert in Occupational Medicine and Internal Medicine. He is Level II accredited and also Board Certified in both Occupational and Internal Medicine. Dr. Bernton testified that his full accreditation permits him to evaluate psychological impairment; he also received training from the author of the Battery for Health Improvement 2, Mr. Dan Bruns. He testified that somatoform disorders are not work-related, but instead are a maladaptive way of coping. Dr. Bernton testified that somatoform complaints are physical complaints that represent emotional conflict.

40. As part of the IME, Dr. Bernton also physically examined the Claimant and reviewed the medical records associated with the March 23, 2013 industrial injury. Dr. Bernton noted that Claimant demonstrated all five Waddell's signs, including complaints of pain at the cervicothoracic junction with minimal axial compression, complaints of lumbar pain with simulated rotation of the hips, pain complaints with skin rolling, inconsistent straight-leg raising, and give-way weakness on strength testing of the right upper extremity. In his opinion, Claimant's complaints represent multiple body systems with multiple non-accident related somatic complaints.

41. Dr. Bernton testified that his findings were consistent with Dr. Chan's findings in that, there were inconsistencies with testing results.

42. Dr. Bernton agreed with Dr. Orgel that Claimant's progressive symptoms of dizziness one month after injury "is unusual." Dr. Bernton testified that Dr. Chan documented full range of motion for Claimant on June 11, 2013 and July 23, 2013 and that his expectation of normal range of motion three months post-accident is resolution and a return to full function.

43. Dr. Bernton testified that range of motion is effort dependent; patients can give decreased but consistent range of motion. Dr. Bernton believed that Claimant did not give maximal effort in range of motion testing with Dr. Campbell. The ALJ finds this is speculation by Dr. Bernton and is not persuasive.

44. Dr. Bernton testified that the AMA Guides, 3rd Ed., Revised, require a physician to perform an analysis to determine that a specific injury is the cause of any impairments and describe the pathophysiology of the particular condition and pertinent host characteristics and establish that the type and magnitude of the factor was sufficient and bore the necessary temporal relationship to the condition.

45. Dr. Bernton testified that Dr. Campbell did not perform this analysis and that Dr. Campbell's evaluation did not meet the AMA Guides' required analysis of causation. He specifically stated that Dr. Campbell did not follow appropriate methodology. He testified that when there are inconsistencies in the medical record, one cannot just go

the AMA tables directly. Dr. testified that in this case, there are substantial discrepancies and that Dr. Campbell rated despite negative findings.

46. Dr. Bernton opined that Dr. Campbell rated for the occipital nerve even though it was documented in the medical records that the occipital nerve is not the cause of the headaches. He adamantly testified that the record does not support an occipital nerve rating because the Claimant underwent occipital nerve injections by Dr. Chan, and those injections worsened the Claimant's headache. Dr. Bernton testified, that if an occipital nerve injury were the cause of the Claimant's headache, the diagnostic occipital nerve injection would have provided pain relief. The ALJ finds this is a matter of differing medical opinions as Dr. Campbell acknowledged that the occipital injections actually made Claimant's condition worse, and yet, she did not terminate her analysis based on that one fact and ultimately determined that the occipital nerve played a role in Claimant's condition.

47. Dr. Bernton disagreed with Dr. Campbell's other ratings as well and testified that she is clearly wrong. Dr. Bernton read the AMA Methodology (page 6) into the record and testified that under the Workers' Compensation Act, it is not appropriate to rate subjective complaints without objective findings.

48. Dr. Bernton testified that the correct impairment rating for Claimant is zero. Although the ALJ finds Dr. Bernton credible in some of his testimony, the ALJ is not persuaded that the correct impairment rating for Claimant is zero.

49. Dr. Bernton testified that Claimant did not report dizziness until April 24, 2013. On cross-examination, Dr. Bernton was questioned about the fact that a March 29, 2013 medical record notes that Claimant complained of dizziness. Dr. Bernton testified that he had the March 29, 2013 when he examined Claimant and reviewed Claimant's medical records and that his opinion is unchanged despite the earlier record of dizziness.

50. On cross-examination, Dr. Bernton testified that a vestibular, or labyrinth, concussion, and other inner ear issues would be expected from a direct blow to the region of the head and neck. The ALJ finds that Claimant suffered a direct blow to his head and neck when the tire fell on him on March 23, 2013. This testimony by Dr. Bernton supports Dr. Campbell's finding of a vestibular issue.

51. Additionally, Dr. Bernton testified that vestibular issues would not show up in radiographic studies or EMG. The ALJ finds that this testimony by Dr. Bernton supports Dr. Campbell's rating for vestibular dysfunction despite the lack of objective findings in radiographic studies or EMG and despite some inconsistencies with other forms of testing.

52. The ALJ finds that Dr. Campbell thoroughly reviewed Claimant's medical records, physically examined Claimant, and conducted appropriate tests.

53. Claimant's records exhibit objective findings related to vestibular dysfunction during Claimant's treatment. Medical records from Dr. Orgel demonstrate that Claimant not only reported dizziness but Dr. Orgel observed nystagmus during his evaluation of Claimant. Claimant's HealthOne Rehabilitation Northwest records show that Claimant's symptoms were reproduced with cervical rotation, "head down", and cervical extension. Those records also state that symptoms were reproduced when Claimant was in the prone position.

54. Claimant's records demonstrate that his providers were treating Claimant for headaches related to occipital nerve impairment. During his treatment, Claimant was seen by Dr. Scott Parker, who noted trigger points in the cervicothoracic region and bilateral atlantooccipital region. Dr. Chan also noted tenderness to palpation over the bilateral greater and lesser occipital nerve insertion. Occipital nerve blocks were completed and Claimant experienced some temporary relief but then experienced increased symptoms. Dr. Chan also recommended acupuncture to treat Claimant's pain in the occiput area. In Claimant's records from HealthOne Rehabilitation Northwest, it is also noted that occipital skin stretch needed to be explored for possible pain relief.

55. As one example of her rationale, and as noted by Dr. Campbell, the AMA Guides provide the following on page 178 regarding a rating for disturbances of vestibular function:

> **Class 2- Impairment of the Whole Person 5-10%**
> A patient belongs in Class 2 when (a) signs of vestibular disequilibrium are present with supporting objective findings; and (b) the usual activities of daily living are performed without assistance, except for complex activities such as bike riding or certain activities related to the patient's work, such as walking on girders or scaffolds.
>
> *AMA Guides to the Evaluation of Permanent Impairment,* 3d Ed., Revised.

56. The ALJ finds that Dr. Campbell acknowledged inconsistencies in the medical record but also determined objective findings from her review of the records and examination of Claimant. Thus, the ALJ finds that there are sufficient and supporting objective findings by Dr. Campbell documented in her report to justify her impairment rating of 16% whole person and that she correctly utilized and applied the AMA Guides.

57. The ALJ finds the opinion of Dr. Campbell more credible and persuasive than that of Dr. Bernton. Dr. Bernton's differing medical opinion from that of Dr. Campbell is not sufficient to overcome Dr. Campbell's opinion.

58. Respondents have failed to overcome the DIME opinion by clear and convincing evidence to show that it is highly probable that Dr. Campbell is incorrect. Consequently, Claimant's appropriate impairment rating is 16% whole person.

59. Respondents have proven by a preponderance of the evidence that Claimant does not need post-MMI medical benefits to prevent deterioration of his physical condition caused by his work injury. Although Dr. Campbell recommended maintenance medical care for Claimant, her recommendation does not constitute substantial evidence of the need for such treatment and her opinion on this issue is not binding. Neither Dr. Chan nor Dr. Hnida recommended medical treatment post-MMI to maintain the Claimant's condition at MMI. Even Dr. Campbell noted that chiropractic, massage, acupuncture, and physical therapy did not provide sufficient or even temporary subjective benefit for Claimant's symptoms. She also noted that a home electric muscle stimulation machine only provided Claimant a transient decrease in pain. There is not sufficient evidence to find that the therapies or treatments recommended by Dr. Campbell are reasonable and necessary to maintain Claimant's condition at MMI and to prevent deterioration of his condition related to the industrial injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). Whether the DIME physician properly applied the

AMA Guides, and ultimately whether the rating has been overcome by clear and convincing evidence are issues of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 2002 (Colo. App. 2000).

5. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000).

6. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id.*

7. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

8. "It is well settled that where the respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover*, the respondents are not precluded from later contesting their liability for a particular treatment." *In re Claim of Dunn, 100113 COWC, 4-754-838-01* (October 1, 2013). *See also Synder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Generally, when respondents contest liability for a particular medical benefit, the claimant bears the burden of proof that the contested treatment is reasonably necessary to treat the industrial injury and is related to the industrial injury. *See Grover, supra.* "Where, however, the respondents attempt to modify an issue that previously has been determine by an admission, they bear the burden of proof for such modification." *In re Claim of Dunn, 100113 COWC, 4-*

754-838-01 (October 1, 2013). *See also Salisbury v. Prowers County School District,* W.C. No. 4-702-114 (June 5, 2012). In 2009, § 8-43-201(1), C.R.S. was amended to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.2d 1230 (Colo. App. 2001). That decision held that while respondents could move to withdraw a previously filed admission of liability, they were not actually assessed with the burden of proof. As found in *Dunn*, the amendment placed that burden on respondents and the statute serves the same function in regard to maintenance medical benefits. In the case at bar, the effect of Respondents' argument at hearing is to terminate previously admitted maintenance medical treatment, and as such, Respondents have the burden by a preponderance of the evidence pursuant to § 8-43-201(1), C.R.S.

9. No persuasive or credible evidence was introduced showing that Claimant needs additional treatment to prevent deterioration of his physical condition caused by his work injury. On the contrary, Respondents have proven by a preponderance of the evidence that Claimant does not need post-MMI medical benefits to prevent deterioration of his physical condition caused by his work injury. The Judge notes that even if the burden had been assigned to Claimant, the outcome would be the same. The Judge acknowledges that Dr. Campbell recommended maintenance medical care for Claimant. However, Dr. Campbell's recommendation does not constitute substantial evidence of the need for such treatment, is not binding, and does not need to be overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). Neither Dr. Chan nor Dr. Hnida recommended medical treatment post-MMI to maintain the Claimant's condition at MMI. Dr. Campbell noted that chiropractic, massage, acupuncture, and physical therapy did not provide sufficient or even temporary subjective benefit for Claimant's symptoms. She also noted that a home electric muscle stimulation machine only provided Claimant a transient decrease in pain. There is not sufficient evidence to find that the therapies and treatments recommended by Dr. Campbell are reasonable and necessary to maintain Claimant's condition at MMI and to prevent deterioration of his condition related to the industrial injury.

10. For purposes of determining levels of medical impairment, a physician shall not render an impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings. Sections 8-42-101(3.7), 8-42-107(8)(c), C.R.S.

11. The Judge is not persuaded by the opinion of Dr. Bernton that Claimant should be rated at zero and that his symptoms are consistent with either a strong somatoform (psychologically-based) contribution to the Claimant's pain presentation or possibly to some misrepresentation. The Judge is not persuaded by the opinion of Dr. Bernton that Dr. Campbell's opinion is clearly wrong and that she did not perform an appropriate analysis or that her evaluation failed to meet the AMA Guides' required analysis of causation. Dr. Campbell conducted a thorough review of Claimant's medical records and physically examined Claimant and conducted her own range of motion testing. Dr. Campbell acknowledged inconsistencies in the medical record but also determined objective findings from her review of the records and examination of Claimant. As found, there are sufficient and supporting objective findings by Dr. Campbell

documented in her report to justify her impairment rating of 16% whole person and that she correctly utilized and applied the AMA Guides.

12. Claimant has consistently complained of chronic pain as a result of the industrial injury. Claimant complained of dizziness/lightheadedness within six days of the industrial injury. Claimant's records exhibit objective findings related to vestibular dysfunction during Claimant's treatment. Medical records from Dr. Orgel demonstrate that Claimant not only reported dizziness but Dr. Orgel observed nystagmus during his evaluation of Claimant. Claimant's HealthOne Rehabilitation Northwest records show that Claimant's symptoms were reproduced with cervical rotation, "head down", and cervical extension. Those records also state that symptoms were reproduced when Claimant was in the prone position. Furthermore, Claimant's records demonstrate that his providers were treating Claimant for headaches related to occipital nerve impairment. During his treatment, Claimant was seen by Dr. Scott Parker, who noted trigger points in the cervicothoracic region and bilateral atlantooccipital region. Dr. Chan also noted tenderness to palpation over the bilateral greater and lesser occipital nerve insertion. Occipital nerve blocks were completed and Claimant experienced some temporary relief but then experienced increased symptoms. Dr. Chan also recommended acupuncture to treat Claimant's pain in the occiput area. In Claimant's records from HealthOne Rehabilitation Northwest, it is also noted that occipital skin stretch needed to be explored for possible pain relief.

13. Although different forms of testing revealed a lack of structural problems that correlate with the pain or dizziness, Dr. Bernton testified that a vestibular, or labyrinth, concussion, and other inner ear issues would be expected from a direct blow to the region of the head and neck (like Claimant had). He further testified that vestibular issues would not show up in radiographic studies or EMG. As found, his testimony supports Dr. Campbell's rating for vestibular dysfunction despite the lack of objective findings in radiographic studies or EMG and despite some inconsistencies with other forms of testing. Additionally, on August 21, 2013, Dr. Chan conducted a Functional Capacity Evaluation and placed Claimant at MMI and assigned four percent whole person impairment per Table 53(II)(B) and three percent whole person impairment for loss of range of cervical motion. Dr. Campbell also rated Claimant for loss of range of cervical motion. Both Dr. Campbell and Dr. Chan were aware that Claimant's range of motion tests had yielded differing results prior to their impairment rating, Notwithstanding, they determined a loss of range of motion.

14. The Judge is not persuaded by the opinion of Dr. Bernton that Dr. Campbell did not perform an appropriate analysis or that her evaluation did not meet the AMA Guides' required analysis of causation.

15. Accordingly, the Judge is persuaded by the opinion of Dr. Campbell and the Judge is not persuaded by the differing medical opinion of Dr. Bernton; his opinion does not constitute clear and convincing evidence that Dr. Campbell's opinion is incorrect.

16. Respondents have failed to overcome the DIME opinion by clear and convincing evidence to show that it is highly probable that Dr. Campbell is incorrect. Consequently, Claimant's appropriate impairment rating is 16% whole person.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the DIME physician's opinions by clear and convincing evidence.

2. Respondents are bound by the 16% whole person impairment rating as determined by the DIME physician, Dr. Campbell.

3. Respondents have proven by a preponderance of the evidence that Claimant is not entitled to post-MMI medical maintenance benefits to prevent deterioration of his physical condition caused by his work injury or to maintain his condition at MMI.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 8, 2015

/s/ Sara L. Oliver
Sara L. Oliver
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

ISSUES

1. Whether the claimant was a statutory employee of the respondent-employer for purposes of workers' compensation coverage, i.e., whether a real estate broker can be a statutory employer of an employee of an independent contractor real estate agent when the statute providing for statutory employer specifically excludes real estate brokers and agents?

2. If the respondent-employer is determined to be a statutory employer, whether the claimant met her burden of proving:

a. Compensability;

b. Medical benefits;

c. Reasonably necessary;

d. Authorized provider;

e. Average weekly wage; and.

f. Penalties for being uninsured.

FINDINGS OF FACT

1. The claimant was hired by Jeff R. in November 2011 as an assistant. The claimant acknowledged that she was paid by Jeff R. through his personal business account and that she knew Mr. R. was an independent contractor of the respondent-employer.

2. The claimant worked as an assistant to Mr. R for over twenty (20) months prior to the subject accident. On August 14, 2013, at approximately 5:00 PM, the claimant was assisting her co-worker, Ted Bachara, move a chair at the office when her heel caught a rip in the carpet, causing her to trip. The claimant's face hit the arm of the chair, knocking out her front tooth and breaking her upper mandible bone.

3. The claimant reported the incident to her supervisor, Mr. R. via text

message the following morning, as well as to fellow member of the team, Jeff Johnson. Mr. R. advised the claimant to locate the workers' compensation information in the office kitchen and call the workers' compensation carrier directly. Shortly after contacting The Hartford, the claimant was informed that there was no workers' compensation coverage for employees.

4. The claimant sought treatment for her injuries at Meyer & Lydiatt Family Dentistry on August 20, 2013, where she had received dental care prior to this incident. Several years before the subject accident the claimant injured her front #8 tooth, which required placement of a crown. As a result of the subject accident, the claimant's #8 crown dropped and she sustained a fractured mandible.

5. The claimant's medical providers never gave her work restrictions as a result of her injuries.

6. The ALJ finds that the medical treatment provided to the claimant was reasonable, necessary, and related to the claimant's industrial injury herein.

7. Jeff R. testified via telephone that he is an independent contractor with the respondent-employer. He receives commissions only and is not an employee of the respondent-employer. The respondent-employer provides him with an office. He declined worker's compensation coverage in his contract with the respondent-employer. He owns his own corporation which pays its own taxes separate from the respondent-employer. He pays his own employees. For federal tax purposes, he is not considered an employee of the respondent-employer. He has no authority to hire employees for the respondent-employer.

8. Jeff R. hired the claimant as his personal assistant. He did not obtain prior approval from the respondent-employer to hire the claimant as stated in his contract. He paid the claimant from his personal business account. The claimant worked for him, exclusively, and not for the respondent-employer.

9. The claimant told Mr. R. that she knocked out her tooth but did not tell him initially that it happened at work. She did tell him it was work-related about two to three weeks later and asked him how to go about making a worker's compensation claim. He asked one of the employees from the respondent-employer and then referred her to the worker's compensation poster in the break room.

10. The claimant never provided Mr. R. with doctor restrictions regarding her injury. He terminated the claimant on August 15, 2014.

11. Joe C. testified that he is a real estate broker and his company is the respondent-employer. As a broker, he enters into independent contractor contracts with real estate agents, such as Jeff R. Jeff R. worked for commission only and waived workers' compensation coverage. Jeff R. had no authority to hire employees for the respondent-employer. Jeff R. was authorized to use the respondent-employer emblem for marketing purposes. Jeff R. acknowledged that he did not have workers' compensation coverage for the claimant.

12. The respondent-employer had an employee manual for its 20 office employees. The respondent-employer also had a policy manual for its agents. Agents were to provide workers' compensation coverage to their employees. The respondent-employer required agents to obtain prior approval for their employee hires. Jeff R. did not obtain prior approval and Joe Clement found out about the claimant's hire months later.

13. The respondent-employer maintains workers' compensation coverage for its employees as depicted in the caption to this claim..

14. The ALJ finds that the claimant is neither a licensed real estate sales agent nor a licensed real estate broker.

15. The ALJ finds that the claimant is the statutory employee of the respondent-employer.

16. The ALJ finds that section 8-40-301(2), which excludes licensed real estate sales agents and licensed real estate brokers from the definition of "employee" is inapplicable to the claimant.

17. The ALJ finds that the claimant performed services for pay for Jeff R. and is thus clearly an employee.

CONCLUSIONS OF LAW

1. According to C.R.S. §8-43-201, "(a) claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the

evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. *Hosier v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

2. In deciding whether claimant has met her burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

3. An injury "arises out of" employment when the activity causing the injury is "sufficiently interrelated to the conditions and circumstances under which the claimant generally performs his job, that the activity may reasonably be characterized as an incident of employment." *Novak v. Pueblo County*, W.C. No. 4-251-989 (ICAO, October 12, 1995); *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *City of Northglenn v. Eltrich*, 908 P.2d 139 (Colo. App. 1995).

4. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Sarvestani v. Dale A. Wall, DDS*, W.C. Nos. 4-206-040; 4-464-407 (ICAO October 16, 2001).

> All that is necessary to warrant a finding of a causal connection between the accident and the disability is to show facts and circumstances which would indicate with reasonable probability that the injury or death resulted from or was precipitated by the 'accident.' *Colo. Fuel & Iron Corp. v. Indus. Comm.*, 380 P.2d 28, 30 (Colo. 1963).

5. The ALJ concludes the claimant is credible.

6. The ALJ concludes that Jeff R. did not carry workers' compensation insurance for his employees.

7. Under § 8-41-401(1)(a), C.R.S., a company that contracts out part or all of its work to any subcontractor is the statutory employer of the subcontractor's

employees. The purpose of the statute is "to prevent employers from avoiding responsibility under the workers' compensation act by contracting out their regular business to uninsured independent contractors." *Finlay v. Storage Technology Corp.*, 764 P.2d 62, 64 (Colo. 1988). The statutory scheme provides that it is the general contractor to whom the employees of all subcontractors may look for workers' compensation if their immediate employer is uninsured or financially irresponsible. *Edwards v. Price*, 550 P.2d 856 (Colo. 1976), appeal dismissed, 429 U.S. 1056 (1977). This distinguishes the general contractor from the subcontractor and is the rationale which sustains the different treatment accorded general contractors by statute. *Id.* In the event the independent contractor is uninsured, the statute permits employees of subcontractors or independent contractors to reach up-stream to the statutory employer to recover workers' compensation benefits. *Finlay, supra*; *Herriott v. Stevenson*, 473 P.2d 720 (Colo. 1970). Here, Mr. R. waived workers' compensation coverage for himself; however, his waiver does not extend to his employees.

8. The test for determining whether an employer has subcontracted out its regular business is set forth in *Finlay v. Storage Technology Corp.* The *Finlay* court noted that earlier decisions narrowly limited the definition of the contractor's "regular business" to the "primary business" of the contractor. *Finlay*, 764 P.2d at 67. However, the *Finlay* court significantly expanded that standard to the total business of the company's operation. *Id.*, s*ee also Shumiloff v. Frey*, W.C. No. 4-005-377 (April 24, 1992), *aff'd, Trinity Lutheran Church v. Shumiloff* (Colo. App. No. 92CA0794, April 29, 1993) (not selected for publication*).*

9. Under *Finlay*, the regular business test is satisfied if the contracted-out services are part of the employer's regular business as defined by its "total business operation," which considers "the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer." *Finlay*, 764 P.2d at 67. Furthermore, the importance of the contracted service can be demonstrated by showing that the employer would "find it necessary to accomplish the work by use of his own employees rather than forego the performance of the work." *Id.*; *see also Campbell v. Black Mountain Spruce, Inc.*, 677 P.2d 379, 381 (Colo. App. 1983).

10. Whether a person or entity has the status of statutory employer is generally a question of fact. *Thornbury v. Allen,* 991 P.2d 335, 339 (Colo.App.1999). Application of the regular business test is dependent on the facts of each individual case. *See Virginia Heritage Square Co. v. Smith*, 808 P.2d 366 (Colo. App. 1991). Consequently, an ALJ's findings must be upheld if supported by substantial evidence. C.R.S., § 8-43-301(8) (2014).

11. The facts are straightforward. The respondent-employer is a real estate brokerage. Buying and selling homes in the Rocky Mountain region is its regular business. The respondent-employer contracted with Jeff C. R. as an independent contractor real estate agent to further its business of buying and selling homes in the Rocky Mountain region. Mr. R. hired the claimant as an assistant to aid him in the business of buying and selling homes. Thus, the respondent-employer contracted out its regular business to Jeff C. R. and his employees. As a result the respondent-employer qualifies as the claimant's statutory employer pursuant to § 8-41-401(1)(a)(I), C.R.S. and is liable for the claimant's workers' compensation benefits.

12. The respondents submitted the legislative history of HB1052 (1985). The ALJ finds that the statute is clear on its face and there is no necessity to resort to legislative history.

13. The ALJ concludes that the claimant suffered her facial injuries arising out of and in the course of her employment with Mr. R. and thus by statute with the respondent-employer.

14. C.R.S. §8-42-101(1)(a) provides that respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007). As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (ICAO May 10, 2007), "a showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary."

15. Pursuant to section 8-42-101(6)(a),

> If an employer received notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

16. Pursuant to section 8-42-101(6)(b),

> If a claimant has paid for medical treatment that is admitted or found to be compensable and costs more than the amount specified in the workers'

compensation fee schedule, the employer...or…insurance carrier shall reimburse the claimant for the amount paid.

17. The ALJ concludes, as found above, that the ensuing medical treatment sought by the claimant subsequent to the injury was reasonable, necessary, and related to her industrial injury and thus payment for this treatment is the responsibility of the respondent-insurer.

18. According to *Romayor v. Nash Finch Co.,* W.C. No. 4-609-915 (ICAO March 17, 2006), "the claimant has the burden to prove a causal relationship between a work-related condition or injury and the wage loss for which compensation is sought." In order to receive temporary disability benefits, claimant must establish a causal connection between the injury and the loss of wages. *Turner v. Waste Management of Colorado*, W.C. No. 4-463-547 (ICAO July 27, 2001).

19. The ALJ concludes that the claimant has established by a preponderance of the evidence that on August 14, 2013 she sustained an injury to her face and teeth arising out of and in the course of her employment with the respondent-employer.

20. The ALJ concludes that the claimant has established by a preponderance of the evidence that the respondent-employer denied the claim and failed to provide medical treatment for non-medical reasons subsequent to the denial.

21. The ALJ concludes that the claimant has established by a preponderance of the evidence that the medical care received by the claimant, subsequent to the respondent's denial of medical treatment, was reasonable, necessary, and related to the claimant's industrial injury of August 14, 2013 and that the respondent-insurer is responsible for payment of that care in accordance with the Medical Fee Schedule.

22. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that the claimant suffered a loss of wages, due to her industrial injury.

23. The ALJ concludes that based upon the totality of the evidence, the claimant has failed to establish by a preponderance of the evidence that the respondent-employer is uninsured and subject to penalties.

24. The ALJ concludes that based upon the totality of the evidence, this is a medical claim only and defers a decision on the claimant's average weekly wage until indemnity benefits are established.

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The respondent-employer is the claimant's statutory employer.

3. The respondent-insurer is responsible for the claimant's medical treatment for the injuries sustained in the August 14, 2013 industrial accident.

4. The claimant's claim for indemnity benefits is denied and dismissed.

5. The claimant's claim for penalties is denied and dismissed.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 23, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury, whether claimant has proven by a preponderance of the evidence that he received medical treatment that was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of November 12, 2013 through May 2014?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury, what is claimant's average weekly wage ("AWW")?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employment?

FINDINGS OF FACT

1. Claimant was hired by employer on or about November 7, 2013 as a laborer. Claimant testified he was paid $12 per hour when he was hired. Claimant further testified he was given a raise to $14 per hour on the day he was terminated. Claimant was required to pass a pre-employment drug screen prior to being hired.

2. Claimant testified his job duties included working on a rig and was eventually given the job of a driver where he would pick up people and/or parts from Denver and deliver them to Rifle, Colorado. Claimant testified that on November 11, 2013 he drove to Longmont, Colorado as part of his job duties for employer. Claimant testified he had driven at least 13 hours this day and had only slept 4 hours. Claimant testified he reported to work on November 12, 2013 and was too tired to drive. Claimant testified he went home and slept and returned to work and was told he would be driving to Odessa, Texas. Claimant testified that after speaking with his wife, he decided he was not going to drive to Texas for employer.

3. Claimant testified he returned to employer's shop and spoke with Mr. Brach, the owner. Claimant testified he informed Mr. Brach that he would prefer to work in the shop or on a rig. Claimant testified Mr. Brach told claimant employer was not going to use him and if he didn't leave he was fired. Claimant further testified that Ms. Ottman, the office manager, told claimant that they would be taking money out of his paycheck to pay for the pre-employment drug screen. Claimant testified that Mr. Brach then shoved claimant and said, "Get out of my office!" Claimant denied that he took a swing at Mr. Brach and denied that he informed Mr. Brach that he was quitting when he came back to employer on November 12, 2013.

4. Claimant testified he and Mr. Brach then began fighting and another employee, Mr. Hofius, then ran up the stairs to where claimant and Mr. Brach were fighting and jumped on claimant's back. Ms. Ottomann instructed another employee to call the police and Mr. Brach and Mr. Hofius then let claimant up. Claimant testified that after he was let up, an employee then hit claimant from the side causing claimant to fall down the stairs. Claimant testified when he got outside, he grabbed his skateboard from his vehicle and Mr. Brach grabbed a pipe before claimant got back into his vehicle and was driven home by claimant's wife.

5. Claimant denied on cross-examination telling Ms. Murray that he was quitting prior to speaking with Mr. Brach on November 12, 2013. Claimant's testimony was contradicted by the testimony of Ms. Murray who testified in detail that claimant came to work on November 12, 2013 and informed Ms. Murray that he was going to Texas as part of his assignment, before returning after going home and bringing his hard hat and shirt and said to Ms. Murray, "I can't do this. I quit." Ms. Murray testified that she said she would inform Mr. Brach and claimant said, "I'll tell him myself" before going upstairs to Mr. Brach's office.

6. On cross-examination, when questioned as to why claimant had brought his hard hat and other equipment with him if he wasn't intending on quitting, claimant testified he thought he was going to be fired when he turned down the assignment.

7. Claimant provided contradicting testimony regarding his attempts to return to work in 2014, including testimony that he returned to work sometime in May 2014, he believed. Claimant also testified that he did not recall what happened when he first attempted to return to work.

8. Mr. Brach testified at hearing in this case that he hired claimant in November 2013 to work as a driver. Mr. Brach testified that on November 12, 2013 claimant came in and said he was tired, so Mr. Brach sent him home. Claimant later returned to employer and Mr. Brach testified he offered claimant a job driving to Texas. Mr. Brach testified that claimant did not have clothes for the trip and left to go home and get clothes. Mr. Brach testified that when claimant returned he was in the office with Ms. Ottman when claimant came in and informed Mr. Brach that he was quitting. Mr. Brach testified that claimant demanded his paycheck immediately and was informed

that because he was quitting, he would receive his paycheck on the scheduled payday. Mr. Brach testified that he and Ms. Ottman informed claimant that his check would include certain deductions and claimant demanded that no deductions be taken from his check. Mr. Brach denied threatening claimant's job if he did not make the drive to Texas.

9. Mr. Brach testified claimant pushed him and took a swing at Mr. Brach before Mr. Brach was able to get claimant in a headlock. Mr. Brach testified he had claimant in a headlock while claimant was on top of him on the ground. Mr. Brach testified he was able to get claimant to calm down to the point that he was able to let him out of the headlock and followed claimant down the stairs and out the door. Mr. Brach testified that when claimant got outside the building, he went to his vehicle and got a skateboard and swung the skate board at Mr. Brach. Mr. Brach testified he then went and got a pipe for protection. Mr. Brach testified that claimant then said he was going to come back with a gun.

10. Claimant's threat to return with a gun was confirmed in testimony by Ms. Murray.

11. Mr. Brach testified that claimant left in his vehicle and the police eventually showed up. Mr. Brach testified claimant was subsequently arrested by the police running over fence posts on employer's property in his car.

12. Mr. Nick Hofius testified at hearing. Nick Hofius is the shop foreman for employer. Nick Hofius testified that on November 12, 2013 he was in the shop and hear a commotion and came into the office and witnessed claimant and Mr. Brach wresting. Nick Hofius testified he came up the stairs and saw Mr. Ottman holding claimant's left arm as he was on top of Mr. Brach. Nick Hofius denied hitting claimant and denied pushing claimant down the stairs. Nick Hofius testified that he heard Mr. Brach say to claimant, "calm down and we'll let you go." Nick Hofius testified claimant left the building and then began swearing at him and Mr. Brach and got a skateboard and began swinging it at Mr. Brach. Nick Hoifus testified he returned to the shot and heard loud bangs from the back of the shop and later noticed that the employer's fence posts that held an eight foot chain link fence were damaged.

13. Ms. Wright testified at hearing in this matter. Ms. Wright testified she was in her office across the hall from Mr. Brach's office when claimant came in on November 12, 2013 and informed Mr. Brach that he was quitting. Ms. Wright testified that she witnessed claimant take a swing at Mr. Brach. Ms. Wright testified she heard claimant say, "don't push me" but witnessed Mr. Brach with his hands up. Mr. Wright testified she did not see Mr. Brach push claimant.

14. Mr. Don Hofius testified at hearing. Don Hofius testified that he is not employed by employer but was visiting employer on November 12, 2013. Don Hofius testified claimant came in on November 12, 2013, went upstairs and came back down

approximately 10 minutes later and said, it looks like I'm going to Texas. Don Hofius testified claimant then came back to the office and had his hard hat, book and shirt and said, "I can't do this anymore. I quit."

15. Don Hofius testified claimant went upstairs and he later heard a thud and Ms. Ottman yell, "Call 911". Don Hofius testified he went to the stairs and saw Mr. Brach on the ground on his back with claimant on top of him in a headlock. Don Hofius testified Mr. Brach said, "If you calm down, I'll let you go." Don Hofius testified Mr. Brach let claimant go, claimant came downstairs and went outside. Don Hofius testified he went outside after claimant and saw claimant come back on the property with a skateboard that he was swinging. Don Hofius testified he heard claimant say he was going to get a gun.

16. Ms. Ottman testified at hearing regarding the incident of November 12, 2013. Ms. Ottman testified she informed claimant that he was scheduled to make a run to Texas in the evening of November 12, 2013. Claimant then left to get the things he would need from home. Ms. Ottman testified approximately 20 minutes later her phone rang and she was informed by the secretary that claimant had quit, but that he wanted to talk to Mr. Brach.

17. Ms. Ottman testified claimant came upstairs and said he wanted no hard feelings. Ms. Ottman testified claimant then asked about his check and was informed that he would be issued his check at the end of the week. Ms. Ottman testified claimant told Ms. Ottman that she wasn't going to take any money from his check and was informed by Mr. Brach that it was time to leave. Ms. Ottman testified claimant and Mr. Brach then began to scuffle and she was trying to hold claimant's arm down so that he did not strike Mr. Brach. Ms. Ottman testified Nick Hofius came upstairs and claimant was let go once by Mr. Brach after he settled down. Claimant then went down the stairs and outside. Ms. Ottman testified that Nick Hofius did not hit or kick claimant. Ms. Ottman testified that nobody pushed claimant down the stairs.

18. Ms. Ottman testified that when claimant got outside, he threw down his keys and took off his shirt and tried to get Mr. Brach and Nick Hofius to fight him. Claimant then went to his car and got a skateboard that he began swinging at Mr. Brach. Mr. Brach then got a metal pipe and claimant left.

19. Ms. Ottman testified that claimant was not given a raise to $14 per hour.

20. Claimant's testimony in this case is found to be not credible. Claimant's testimony is contradicted by multiple witnesses regarding his actions on November 12, 2013 and his own interrogatory answers. When questioned regarding his contradictory interrogatory answers, claimant maintained that he had not changed his answer, but instead made a mistake.

21. Claimant further testified that he was given a raise of $2 per hour after only one week on the job. Claimant's testimony in this regard was contradicted by the testimony of Ms. Ottman and not supported by any employment records.

22. Claimant's testimony that his job was threatened by Mr. Brach was likewise contradicted by Ms. Ottman. Claimant's testimony that he was knocked down the stairs was likewise contradicted by Ms. Ottman, Mr. Brach, Don Hofius and Nick Hofius. The ALJ cannot and does not credit claimant's testimony with regard to these actions in any manner.

23. Multiple witnesses for employer noted that claimant returned to employer's premises after being terminated and caused damage to employer's fence. Claimant denied that he was arrested for causing damage to employer's fence, but acknowledged on cross-examination that he was taken to jail for an unrelated outstanding charge. Claimant testified he went to St. Mary's Hospital for medical treatment approximately 30-45 minutes after the incident with employer. Claimant testified he again returned to the hospital after being released from jail.

24. The medical records entered into evidence document a history of claimant having prior medical treatment for physical altercations. Some of these altercations may have been related to mixed martial arts fighting and some to non-sanctioned physical altercations. Notably, claimant underwent evaluation for bipolar disorder on July 9, 2013 with Dr. Kevin Coleman. In this evaluation, it was noted that claimant has gotten into fights in the past.

25. In August 2013, claimant was referred for treatment with Mind Spring clinic by his mother. Claimant noted that he was there "to be diagnosed and to seek any help with my anger to keep me from getting into any fights." It was noted at this evaluation that claimant was using methamphetamines by smoking or snorting and had used this substance 15 times in the previous 30 days. It was reported claimant had used methamphetamines 365 days in the previous year. It was noted claimant had criminal charges pending against him and was facing a court date of November 2013. Claimant reported he began using drugs again in November 2012 following a break up with his girlfriend. It was recommended that claimant be referred for residential treatment for substance abuse, but claimant declined the referral.

26. At other parts of claimant's medical records, claimant reports a history of smoking methamphetamines on a daily basis, using marijuana on a daily basis and smoking crack cocaine on a weekly basis. On February 15, 2013 claimant reported that he experienced many fights and had a hard life.

27. Claimant was also examined on October 1, 2013 by St. Mary's Hospital with a complaint of flank pain. Claimant was diagnosed with acute renal colic and provided with prescription medications including Flomax, oxydodone, Zofran and ibuprofen.

28. Claimant was evaluated following his altercation with Mr. Brach at 8:01 p.m. at St. Mary's Hospital. Claimant reported to St. Mary's Hospital that he was involved in an altercation with his employer when his employer pushed him, and he fought back. Claimant reported he was hit in the face, left flank, left side of his back and abdomen. Claimant also reported he was pushed down a flight of stairs. Claimant underwent diagnostic testing and was diagnosed with 2 lumbar transverse process fractures at L2 and L3. There was no significant surrounding hematoma noted by the physicians. Claimant was diagnosed with a closed fracture of lumbar vertebra without mention of spinal cord injury and contusions of multiple sites, not elsewhere classified. It was reported in the records that claimant reported he had taken a Percocet prior to his arrival at the hospital. Claimant was eventually discharged from the hospital with instructions to follow up with his primary care physician.

29. Claimant returned to the hospital on November 13, 2013 and it was reported that after he was discharged the previous evening, he was taken to jail due to a restraining order. Claimant reported he had pain in his right hand and elbow due to hitting the door at the jail. Claimant was evaluated and a fracture was ruled out before claimant was discharged with a starter pack of 5 mg Percocet and 1mg Ativan.

30. Claimant sought treatment with Nancy Allen, a physical therapist, on December 12, 2013. Claimant reported he was repeatedly kicked during the fight and sustained transverse process fractures at the L1, L2 and L3 levels.

31. Claimant was evaluated by Christopher Ellis, a physical therapist, on January 7, 2014. Claimant reported to Mr. Ellis that he was involved in an altercation with his boss that resulted in him, somehow, falling down the stairs. Mr. Ellis diagnosed claimant with low back dysfunction and healed transverse process fractures at L2-3.

32. Claimant returned to St. Mary's Hospital on February 28, 2014 with continued complaints of low back pain. Claimant again reported he was kicked and pushed down a flight of stairs. Claimant reported taking oxycodone on a daily basis. Dr. Fox noted he reviewed a magnetic resonance image from January 9, 2013 (which is determined to be a typographical error and refers to 2014) that showed a normal central canal without evidence of herniated disk abnormality.

33. Claimant maintains that he was injured on November 12, 2013 during the altercation with Mr. Brach and other employees on that date. While it is true that injuries sustained during a physical altercation may be compensable if the altercation is related to a work related function, such as a paycheck, claimant must still prove by a preponderance of the evidence that his injury was related to the altercation.

34. In this case, claimant's testimony regarding the altercation is completely and wholly not credible. The ALJ finds that claimant was not kicked by employees and was not thrown down the stairs as he reported to his physicians. While claimant was diagnosed with a transverse process fracture at St. Mary's Hospital that evening,

claimant was witnesses swinging a skateboard and attempting to continue a fight with Mr. Brach and other employees after the altercation had ended.

35. The ALJ finds and concludes that claimant has failed to demonstrate that his injuries were sustained in the altercation with employer. The ALJ notes that claimant's accident history regarding the physical altercation was exaggerated to his physicians, including reports that he was kicked multiple times and thrown down the stairs is contradicted by the testimony of other witnesses present at the time.

36. Most significantly, claimant's actions of continuing to challenge Mr. Brach to fight and swinging a skateboard at him in a threatening manner following the altercation is found to be inconsistent with the reported injuries of a transverse process fracture at the L2-3 level.

37. Notably, respondents do not need to prove that claimant's injuries occurred at some other time or place, but testimony was presented that claimant, following the altercation, was damaging employer's fence. Regardless, the ALJ concludes that claimant's reported accident history involving being thrown down the stairs and kicked in the back strays so far from the testimony at hearing that the altercation involved a tumble to the floor in which claimant was on top of Mr. Brach while Mr. Brach had claimant in a head lock and Ms. Ottman was attempting to keep claimant from striking Mr. Brach, that the ALJ finds any medical opinions relating the L2-3 transverse process fractures to be related to the altercation to be unreliable.

38. Because claimant has failed to prove that his injuries arose out of the altercation with employer, claimant's claim for benefits is dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d

385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As noted above, it is claimant's burden to establish by a preponderance of the evidence that his injury is related to a work injury. Where claimant's testimony is not credible regarding the actions leading to his injury, claimant faces a large burden in establishing that his claim is compensable.

5. In this case, the ALJ credits the testimony of Mr. Brach, Ms. Ottman, Ms. Murray, Nick Hofius and Don Hofius over the testimony of claimant. The ALJ finds and determines that the actions of scuffling with Mr. Brach on November 12, 2013 did not result in the need for claimant's medical treatment.

6. The ALJ notes that testimony was presented that claimant was swinging a skateboard and threatening employees after the scuffle. The ALJ finds that these actions are inconsistent with claimant having injuries noted in the medical records. The ALJ further notes that there was testimony presented that claimant returned to employer's premises and damaged the fence on employer's property. These actions are likewise inconsistent with claimant having injuries noted in the medical records.

ORDER

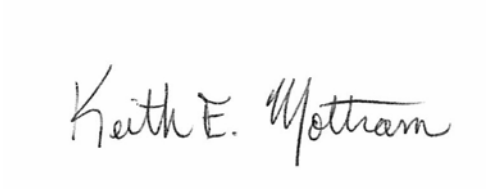
It is therefore ordered that:

1. Claimant's clam for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 27, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did the claimant prove by a preponderance of the evidence that on July 1, 2014 he sustained a compensable injury arising out of and in the course of his employment?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the period of July 2, 2014 through July 9, 2014?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable and necessary medical expenses for the alleged injury of July 1, 2014?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the period of July 11, 2014 through July 23, 2014?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 18 were admitted into evidence. Claimant's Exhibit 19 was admitted into evidence except for page 1. Claimant's Exhibit 20 was admitted into evidence. Respondents' Exhibits A through K were admitted into evidence. The deposition of Christine Chase was admitted into evidence.

2. The claimant was employed at the employer's store as a grocery manager.

3. The claimant sustained an admitted injury to his low back on November 15, 2013. On February 24, 2014 the respondent employer filed a General Admission of Liability (GAL) for this injury admitting for temporary total disability from November 16, 2013 through February 18, 2014, and for temporary partial disability commencing February 19, 2014. The claim for this injury is assigned W.C. 4-935-186.

4. On November 15, 2013 the claimant received treatment at the emergency room. The records reflect that the claimant gave a history of "recurrent back injuries." He reported that he was at work walking down the stairs when a scanner gun fell from his belt and he stumbled on it. He fell forward and caught himself on the railing. The claimant reported low back pain but no subjective weakness or paresthesias. He advised that in the past he had similar back injuries and his symptoms were controlled

by pain killers and muscle relaxers including hydrocodone. The claimant reported he did not have a primary care physician (PCP) and had received these prescriptions in the "emergency department setting." The claimant was given a diagnosis of "back pain" and prescribed Percocet (oxycodone-acetaminophen).

5. The claimant was referred to Concentra Medical Centers (Concentra) for treatment. On November 16, 2013 he was seen by PA-C Jeffry Winkler. PA Winkler noted a history that the claimant twisted his back when he fell down some stairs at work. The claimant reported instant low back pain. PA Winkler noted decreased active range of motion in all directions with spasm of the lumbar spine at L2, L3, L4 L5 and S1. There was "myospasm with listing to the right." On November 16, 2013 Rosalinda Pineiro, M.D., completed a Physician's Report of Worker's Compensation Injury (WC 164). She prescribed Percocet, Valium and Ibuprofen. She placed the claimant on a "no activity status."

6. On December 5, 2013 the claimant underwent a lumbar MRI. The radiologist's impressions included: (1) Disk degeneration at the mid and the L4-L5 level with annular bulging and more focal right paracentral disk extrusion. There was extension of disk material into the right lateral recess with effacement and posterior displacement of the right exiting L5 nerve root. There was moderate right-sided subarticular recess stenosis; (2) There was disk degeneration at the L3-L4 level with annular bulging and central disk herniation, probable extrusion. An associated annular fissure was present There was effacement of the thecal sac with mild central canal and bilateral foraminal stenosis; (3) There was a transitional vertebral body at L5 and disk desiccation with annular bulging at the L5-S1 level. There was no evidence of herniation or stenosis.

7. On December 6, 2013 Dr. Pineiro reviewed the MRI results and referred the claimant for a physical medicine consult because of the "positive findings." She also noted the claimant had been given an "interferential unit" to help with his pain. Percocet and valium were continued for 10 more days. On December 20, 2013 Dr. Pineiro noted that the claimant could not be seen by physiatry until January 16, 2014 so she referred him for a neurosurgical consultation with Dr. Widdle or Dr. Coester. At this time Dr. Pineiro diagnosed low back pain with radiculopathy and noted that medication and physical therapy had not helped the claimant.

8. On January 16, 2014 Jeffrey Wunder, M.D. performed a physiatric consultation. The claimant reported central to right lumbosacral pain which he described as constant, aching and throbbing. He gave a history of falling and twisting his back on November 15, 2013, but his past history was reported as "unremarkable." Dr. Wunder assessed right L5 radiculopathy, right L4-5 disc protrusion and multilevel degenerative disc disease and bulges. Dr. Wunder recommended an L5 transforaminal epidural steroid injection.

9. On January 16, 2014 the claimant was examined by Hans Coester, M.D. Dr. Coester noted the claimant's history of falling and twisting his back resulting in spasm "so severe he could barely tolerate and was walking dramatically abnormally."

However the claimant reported he was getting progressively better. The claimant reported he had "no chronic medical problems." Dr. Coester reviewed the MRI and noted a "right-sided L4-5 disc protrusion that may contact the L5 nerve root" and a minor disc bulge at L3-4. Dr. Coester opined the L4-5 disc protrusion was probably responsible for the claimant's pain and recommended an epidural steroid injection at the L4-5 level to slow down inflammation. Dr. Coester did not recommend surgery since the claimant was "slowly getting better."

10. On January 27, 2014, Dr. Pineiro recommended an Empi machine (TENS unit) because the claimant reported pain reduction of between 20% - 50% through use of a TENS unit in physical therapy. Dr. Pineiro also recommended a decrease in Percocet with use of the unit. Dr. Pinero continued Valium and prescribed Lyrica. She indicated the claimant should remain on a no activity status pending injections.

11. On February 14, 2014 Dr. Wunder performed a right L5 transforaminal epidural steroid injection for spinal nerve block. On February 17, 2014 the claimant reported to Dr. Pineiro that the injection was helpful for the first 48 hours but his pain was returning. Dr. Pinero also altered the claimant's restrictions to no lifting or pushing over 5 pounds, change positions every hour and work 4 hours per day 5 days per week.

12. The claimant returned to work part-time on February 19, 2014. He performed light duty. He testified that it was difficult to stand and reach while performing these duties.

13. On February 20, 2014 Dr. Wunder recommended a second injection. Dr. Wunder also prescribed OxyContin and reduced the claimant's use of Percocet to no more than 2 per day for "breakthrough pain."

14. On March 13, 2014 Dr. Wunder noted the claimant initially had improvement after the injection but he has experienced extensive low back and right leg pain. Dr. Wunder opined the claimant was showing weakness again in the L5 myotome and that his response to the injection was "poor." Dr. Wunder recommended against further injections and advised the claimant to return to Dr. Coester for reevaluation. Lyrica was discontinued because of side effects.

15. On March 13, 2014 Joel Cohen, PhD performed a psychological evaluation of the claimant. Dr. Cohen assessed a pain syndrome associated with a general medical condition as well as psychological factors along with an injury-related diagnosis of adjustment reaction with mixed emotional features. Dr. Cohen recommended 6 to 8 sessions of psychotherapy "to assist with pain management and stress reduction."

16. On March 20, 2014 the claimant reported a sharp increase in pain and PA-C Julia Balderson took him off of work. On March 24, 2014 Dr. Pineiro continued the claimant's no activity status and recommended a new MRI.

17. On March 25, 2014 Dr. Coester again examined the claimant. The claimant reported increased pain after he returned to work and stated that he had

severe back pain going down his right leg to his foot. Dr. Coester's impression was L5 radiculopathy and he recommended a new MRI.

18. On April 7, 2014 the claimant underwent a repeat lumbar MRI. The results of this MRI were compared to the December 2013 MRI. The radiologist noted that the MRI findings were essentially unchanged.

19. On April 8, 2014 the respondents conducted video surveillance of the claimant. At 10:06 a.m. the video depicts the claimant carrying a dog in his right arm and walking from the back of his car to the driver's door. The claimant walks with a noticeable limp but without swinging his arms. At 10:15 a.m. the claimant gets out of his car. At this time he walks very slowly and with a noticeably worse limp. He swings his arms in a noticeable fashion. He comes to a complete stop when he approaches street curb, and it takes him several seconds to step up on the curb. At 10:25 a.m. the claimant is depicted leaving a building, and walking in the same manner as he did at 10:15 a.m. However, later in the day the claimant is depicted as walking with only a slight but noticeable limp. He also bends at the waist to reach into his car and deposit and remove various items of indeterminate weight. Later in the day the claimant is seen to walk into a building with a slight limp. Later he is taken from the building in a wheel chair and pushed to his car. The claimant walks slowly around the back of the car on two occasions and exhibits great difficulty when getting into the car.

20. On April 16, 2014 Dr. Wunder again examined the claimant. The claimant's major complaint was back pain and he reported that traction had largely alleviated his leg pain. Dr. Wunder noted that Dr. Coester had spoken to Dr. Pineiro and opined the claimant's pain level was disproportionate to the MRI findings. Dr. Coester was hesitant to perform surgery despite "some objective findings." Dr. Pineiro and Dr. Coester had agreed to send the claimant for a psychological evaluation. Dr. Wunder assessed right L5 radiculopathy and right L4-5 herniated nucleus pulposus. The claimant was referred to Dr. Cohen for a psychological evaluation.

21. On April 25, 2014 Dr. Wunder performed a right L5 transforaminal epidural steroid injection.

22. At the respondent's request Judith Weingarten, M.D., performed an independent psychiatric examination of the claimant on April 28, 2014. Dr. Weingarten issued a report on May 12, 2014. In connection with this report Dr. Weingarten interviewed the claimant, reviewed medical records and the surveillance video from April 2014. Dr. Weingarten diagnosed a "high probability of malingering," a probable "opioid disorder," a work injury with abnormal MRI and diagnosis of right L5 radiculopathy and a "previous history of back pain." Dr. Weingarten opined that the claimant does not have a work-related psychiatric condition. In support of this opinion she cited alleged inconsistencies between the claimant's statements to her and the contents of the medical records. For instance, she noted the claimant denied prior use of narcotics except for taking some Percocet for a knee injury. However, the medical records show the claimant told the emergency room (on November 15, 2013) that hydrocodone had helped control back pain in the past. She also opined that the "most

striking" inconsistencies involved the video surveillance where "within the same day [the claimant] walks with no apparent difficult at his own home, and doing errands and walks with a great deal of difficulty when he is at the medical center." Dr. Weingarten also noted that Dr. Wunder opined that the claimant's pain behavior was "disproportionate to the MRI findings."

23. Dr. Weingarten stated in her report that the diagnosis of malingering includes the "intentional production of grossly exaggerated symptoms." She stated that the claimant does have abnormal MRI findings but he could still be malingering by exaggerating his symptoms. Dr. Weingarten opined the "external incentives here are likely obtaining narcotic medications, avoiding work, or obtaining financial compensation." She suggested that the treating physicians review the surveillance video and inconsistencies in the claimant's history to see if they were "concerned about malingering." Dr. Weingarten also expressed concern the claimant was being prescribed opioid medications and diazepam. She cited the claimant's request for hydrocodone at the emergency room, the fact that he ran out of opioids "too soon" on at least one occasion and his continued reports of high degrees of pain despite the use of the medications.

24. The claimant returned to work at light duty on May 7, 2014. Sometime at the end of May or early June 2014 he began working full time.

25. On May 10, 2014 the claimant returned to Dr. Cohen. The claimant reported he had undergone another injection with Dr. Wunder which substantially reduced his lower extremity symptoms. Dr. Cohen noted the claimant had undergone the examination by Dr. Weingarten, although he had not seen her report. Dr. Cohen stated that from his perspective "there is no evidence to suggest malingering nor an inclination towards a symptom magnification." Dr. Cohen was aware the claimant had been videotaped and advised the claimant that the "inconsistencies" mentioned by Dr. Weingarten involved what the videotape showed the claimant could tolerate physically versus his complaints of pain. Dr. Cohen stated his objective was to stabilize the claimant's mood in reaction to the pain and he prescribed Cymbalta.

26. On June 3, 2014, John T. Sacha, M.D., examined the claimant at the request of Dr. Pineiro. The purpose of this examination was to make recommendations regarding further care and to "take over the opioid analgesics." Dr. Sacha's report records that the claimant gave a pre-injury history of "on and off mild back pain in the past but no specific injuries or care." Dr. Sacha documented 3/5 positive Wadell signs, moderate pain behaviors and frequent grimacing. Dr. Sacha's impressions included lumbosacral radiculopathy, adjustment disorder and opioid dependence. Dr. Sacha opined the claimant exhibited "significant symptoms that appear to outweigh the findings." Dr. Sacha recommended an EMG and expressed concern about the claimant's "need for higher amounts of opioid analgesics and other medications." Dr. Sacha discontinued OxyContin and Valium, and switched Claimant to Nucynta 150 and baclofen.

27. On June 11, 2014 Dr. Pineiro stated the claimant could work "modified activity." He was released to work 8 hours per day with no repetitive lifting over 10 pounds and no pushing or pulling with more than 10 pounds of force.

28. On June 18, 2014 Douglas Hemler, M.D. performed electrodiagnostic studies. Dr. Hemler reported the EMG studies were normal with "no current evidence to support lumbar radiculopathy."

29. The claimant testified he was working essentially full-time from the middle of May 2014 through June 2014.

30. On June 24, 2014, Dr. Sacha reviewed the EMG results. He recorded that that the results were "normal with no acute or chronic radiculopathy." Dr. Sacha stated that the claimant exhibited a "nonphysiologic presentation of ongoing symptoms" and opined he was likely at maximum medical (MMI) improvement without the need for further interventional procedures, injections, or surgery.

31. Medical records show that the claimant had received significant treatment for back pain prior to November 15, 2013.

32. In approximately 2006 the claimant sustained a non-industrial back injury while riding a motorcycle. On August 16, 2010 he sought treatment from his PCP, Jay M. Wolkov, D.O., of the Gunnison Family Medical Center (GFMC). Dr. Wolkov noted the history of the motorcycle accident and stated the claimant reported he had "done too much" over the weekend and was now experiencing moderate to severe back pain. Dr. Wolkov prescribed Valium, Ibuprofen and Vicodin for the back pain. On August 21, 2010, Dr. Wolkov wrote a note excusing the claimant from work from August 18-21, 2010. The medical records indicate the claimant did not return for treatment after August 16, 2010, but GFMC "called in" prescriptions for diazepam/Valium and Vicodin through May 5, 2011. On May 5, 2011, and again on June 27, 2011, the GFMC medical records indicate the claimant was advised that he would receive no further medication refills without returning to GFMC for an in-person visit. On July 1, 2011, the medical records indicate that GFMC called the claimant but his phone number had been disconnected.

33. On October 31, 2011 the claimant was examined at the Orthopaedic Center of the Rockies by William D. Biggs, M.D. The claimant reported a history of "a couple of episodes of back pain in the last five years or so where it has kept him out of work." On October 31 the claimant reported this pain had "started buggin him again" and had gotten worse over the last four weeks. X-rays showed a "sciatica type scoliosis curve" and disc degeneration at L5-S1. Dr. Biggs's impressions included disc degeneration, back pain and annular tearing. He opined most of the claimant's symptoms were attributable to muscle spasm" and prescribed a Medrol Dosepak, Flexeril and Vicodin.

34. On April 19, 2013 the claimant presented to Associates in Family Medicine, where he was examined by Steven Broman, M.D. The claimant reported a

history of intermittent back pain for 7 years and that riding in an auto all day had made it acutely worse. On physical examination, Dr. Broman documented that Claimant's gait was "stooped and antalgic bilaterally." There was lumbar paraspinal muscle tenderness. Dr. Broman assessed a "lumbar sprain" and prescribed cyclobenzaprine and hydrocodone-acetaminophen.

35. The claimant returned to Associates in Family Medicine on June 5, 2013 and was examined by Terry Scofield, PA-C. PA Scofield recorded that the claimant "was seen in urgent care by Dr. Bowman [sic] in April and since that time he has had several refills for pain medication and muscle relaxants." The claimant had been told there would be no more refills until he had an appointment. The claimant reported there had been a lot of physical activity to his job that was unexpected and this has worsened his condition. On physical examination the claimant exhibited a "normal gait" but reduced range of motion with extension and flexion. PA Scofield prescribed Vicodin and cyclobenzaprine but advised the claimant that if his pain persisted on such a chronic level for months at a time he needed to be in pain management. PA Scofield referred the claimant to Dr. Brad Sissons for this purpose.

36. There is no credible or persuasive evidence that the claimant ever scheduled an appointment with Dr. Sissons.

37. On June 30, 2014, Carlos Cebrian, M.D., authored a report based on his independent medical examination conducted at the request of the respondent. Dr. Cebrian examined the claimant on May 21, 2014. He also reviewed medical records of the claimant's back treatment prior to November 15, 2013, the medical records after the November 2013 injury, the surveillance video, Dr. Weingarten's report and Dr. Cohen's reports. Dr. Cebrian diagnosed lumbar spine pain, probable malingering "per Dr. Weingarten," chronic opioid use and obesity. Dr. Cebrian wrote that his physical examination was "unremarkable with the exception of mild discomfort and self-limited range of motion." Dr. Cebrian opined that since the November 2013 injury the claimant has exhibited "exaggerated responses." In support of this opinion Dr. Cebrian noted the claimant reported worsening pain despite the absence of an objective changes between the MRIs performed in December 2013 and April 2014. Dr. Cebrian also cited Dr. Coester's opinion that the claimant's symptoms were disproportionate to the MRI findings and the claimant's inconsistent pain behaviors depicted in the surveillance video. Dr. Cebrian opined the claimant had pre-existing degenerative disc disease for which he was treated with narcotic pain medication. Dr. Cebrian wrote that he was unable to "state within a reasonable degree of medical probability whether [the claimant] suffered an injury on" November 15, 2013. Dr. Cebrian further opined that at most the claimant "would have had a temporary aggravation of his underlying multi-level degenerative disc disease." He opined there was no "relationship between the current symptomatology and the work incident" of November 15, 2013. Dr. Cebrian recommended that any provider who is considering treatment watch the video surveillance in its entirety, review the psychiatric IME from Dr. Weingarten, and review then claimant's narcotic history before making any treatment recommendations.

38. The claimant alleges he sustained a compensable foot injury on July 1, 2014. The claim for this injury is assigned WC 4-955-722.

39. The claimant testified as follow concerning the foot injury. On July 1, 2014 he was at work. At approximately 7:00 a.m. he was backing a "power jack" out of a truck and lost his footing. The handle on the power jack then turned and his left foot was crushed against the trailer wall. The claimant opined that his low back problems contributed to this incident because the low back pain made him "unstable" and he did not have good balance. He also testified that the incident was caused by "walking backwards" and using the handle. The claimant stated he reported the injury to the assistant store administrator (Ms. Sheryl Rosell) and to the assistant store manager Christine Chase. The claimant testified that after this incident his left foot was sore and he could not put much weight on it. He also indicated he had intense low back pain.

40. On July 1, 2014 the claimant completed his shift and got off of work at approximately 1:00 p.m. He then went to see Dr. Pinero. The claimant testified he did not believe this was a scheduled visit.

41. Mr. Jesse Ketterman (Ketterman) testified as follows. He is the claimant's fellow employee. He was working on the loading dock on the morning of July 1, 2014. Although he did not see any accident he heard a loud noise like the power jack had hit something. He then saw the claimant who appeared to be in pain, although he could not tell if it was the claimant's foot or back that was hurting. Ketterman testified that prior to July 1, 2014 he observed the claimant had difficulty walking and tended to favor one side. On July 1, 2014 Ketterman observed the claimant was able to walk out of the truck trailer but he was limping much more than before. The claimant told Ketterman that he had mashed his foot but did not mention any back pain.

42. Ms. Christine Chase (Chase) testified as follows. On July 1, 2014 she was the assistant manager at the store where the claimant worked. When she arrived at work at 8:00 a.m. on July 1, 2014, she was advised by a secretary that the claimant had hurt his foot. She went to see the claimant who told her that he stumbled while moving a power jack and smashed his foot between the pallet and the trailer wall. The claimant complained of foot pain but did not mention any back pain. The claimant removed his shoe and sock to show Chase his foot, but she did not see any swelling or bruising. Chase asked the claimant to report back to her before the end of his shift, but he did not report back to her before leaving the store on July 1, 2014. Chase opined that the claimant's limp after July 1, 2014 was no different than it was before July 1.

43. Chase further testified that at approximately 3:00 p.m. on July 1, 2014 she received a call from the claimant stating he had a previously scheduled doctor's appointment for his low back. The claimant advised Chase that he reported to the doctor that he had hurt his foot at work that day. The claimant stated that an x-ray was taken of his foot and that he had suffered a contusion. She recalled the claimant stated that the doctor had taken him off work seven days because of his back and not for his foot.

44. Dr. Pineiro dictated a report concerning her examination of the claimant on July 1, 2014. With regard to the history of present illness she wrote the claimant was returning for a "recheck" of a low back injury and his pain level was 9 out of 10. The claimant reported his back pain was worsening and he did not feel safe at work. The claimant also gave a history that today "he was in the dock and he crush [sic] Lt foot and ankle between the trailer door and pallet." The resulting pain was "moderate." On examination of the lumbar spine Dr. Pineiro noted bilateral muscle spasms. The claimant's range of motion on flexion, extension, left and right lateral flexion and rotation were reportedly "restricted" but painless. Dr. Pineiro assessed a back contusion, radicular pain, foot contusion and ankle contusion. Dr. Pineiro wrote that "due to [the claimant's] severe pain low back and new injury foot and ankle he will not be able to return to work." She advised the claimant that the "ankle and foot would be considered a separate work related injury" that he needed to report.

45. On July 9, 2014 the claimant returned to Dr. Pineiro. He reported that his foot was "back to baseline" but his back pain was "8/10." On examination of the lumbar spine Dr. Pineiro noted bilateral muscle spasms and restricted range of motion that was painful. She noted the claimant was not working and could not work because of pain. She released the claimant to work with restrictions of no squatting and no climbing.

46. The claimant testified that he worked a full day on July 10, 2014. He did not work from July 11, 2013 through July 23, 2014. He stated that he felt sick on July 11 and went to see Dr. Pineiro. He stated that he had not been able to sleep, his face was flush and his neck was tingling and his respiration was not functioning normally. He stated that he had stopped taking his medications prior to July 11, 2014. The claimant explained that he stopped taking his medication because he was concerned the medications were damaging his internal systems.

47. Dr. Pineiro examined the claimant on July 11, 2014 at a "non-scheduled appointment." Dr. Pineiro noted a history that the claimant stopped his medication several days ago and was now experiencing numbness of the face, chest pain, right upper extremity numbness and was "afraid." On examination of the lumbar spine Dr. Pineiro noted no muscle spasms. Dr. Pineiro assessed withdrawal from opioids, radicular pain and back contusion. However, the claimant's range of motion was restricted. Dr. Pineiro placed the claimant on a "no activity" status for the following 24 to 48 hours "due to withdrawal." Dr. Pineiro wrote that at the last visit the claimant was warned he could go into withdrawal.

48. On July 21, 2014 Dr. Pineiro noted there had been a "Sams Conference" with counsel for both parties. There was a discussion of the claimant being off of work since July 1 because of "cervical and low back issues and symptoms were subjective." Dr. Pineiro noted that respondents' counsel would send reports of Dr. Sesin [sic], a psychiatrist and a "history of back issues and drug seeking, which [the claimant] did not report to this provider." She also noted that she would be given a copy of a video recorded in April.

49. On July 22, 2014 Dr. Pineiro again examined the claimant. Dr. Pineiro noted the foot and ankle injury had resolved and the claimant had no limitation from this injury. The claimant reported a pain level of 7/10 and that he was taking his medications as prescribed. He stated he had been unable to work because of back pain. In the lumbar spine Dr. Pineiro noted bilateral muscle spasms and restricted range of motion. Dr. Pineiro wrote that the claimant admitted he had injured his back in a motorcycle accident at home. Dr. Pineiro stated that she "agreed" the claimant had positive MRI findings and that the claimant's subjective symptoms "are not a good barometer to evaluate his condition." She stated that the MRI findings were inconsistent with the claimant's presentation and that this "is shown consistently with" Dr. Sacha, Dr. Coester and "today with myself." She placed the claimant on light duty with the expectation he would be "very limited." She imposed restrictions of no prolonged standing or walking, no repetitive lifting over 10 pounds, no pushing or pulling with over 10 pounds of force and no bending more than 2 times per hour. Dr. Pineiro stated she would refer the claimant for a Functional Capacity Evaluation (FCE).

50. On July 26, 2014 Dr. Pineiro dictated another note regarding the July 1, 2014 visit. She wrote the claimant was working under restrictions for his back when he crushed his left foot "between the truck door and his forklift." His pain was reportedly "9/10." With regard to the ankle she noted no swelling, full flexion, extension, inversion "and eversion but with pain in the foot." There was no discoloration. Diffuse tenderness was present. The claimant's gait was "antalgic." She noted that x-rays revealed no apparent fractures. Dr. Pineiro diagnosed a crush injury of the left foot. She opined to a reasonable degree of medical probability that the foot condition was the result of work-related injury. She further stated that "due to the fact the patient has zero back pain plus crushed foot, patient is going to be placed off work most due to his foot than his low back."

51. On July 29, 2014 Dr. Pineiro authored a WC 164 with regard to the claimant's reported ankle injury of July 1, 2014. She wrote that a as a result of this injury the claimant was unable to work from July 1, 2014 to July 9, 2014.

52. On August 1, 2014 the claimant underwent an FCE. The FCE placed the claimant in the "sedentary-light" work category. He scored 1/5 "by Waddell's protocol indicating that non organic signs are not present and he passed 20/22 validity criteria" which suggested "excellent effort and valid results which can be used for medical and vocational planning." The claimant did not participate in the "constant part of the FCE testing" due to not being safe in his participation in his occasional material testing, especially in his leg lifting, overhead lifting, one hand carrying and dynamic pushing and pulling. The FCE noted the claimant described his job as "very physical, and he is not able to perform his regular work related tasks."

53. On August 10, 2014 Dr. Pineiro issued a report opining the claimant had reached MMI on August 8, 2014 with a 17% whole person impairment rating. This included 7% impairment of the lumbar spine and 11% impairment for reduced range of motion in the lumbar spine.

54. Dr. Wunder reviewed the surveillance video from April 2014. He also reviewed Dr. Cebrian's report. In a report dated August 13, 2014 Dr. Wunder commented that the video did show "some mild limping occasionally. Therefore, he could not say the claimant had "absolutely no back pain." However, Dr. Wunder opined that there was "significant symptom magnification." Dr. Wunder further opined that that Dr. Pineiro's rating was correct "based on information given." Dr. Wunder also noted that the claimant underwent an FCE and he was given a restriction "in lifting, pushing, and pulling." However, Dr. Wunder stated the FCE reports that none of these activities were tested. Therefore Dr. wunder did not "necessarily agree with the physical restrictions."

55. The claimant proved it is more probably true than not than on July 1, 2014 he sustained an injury to his left foot arising out of and in the course of his employment. The claimant also proved it is more probably true than not that this injury proximately caused temporary total disability for the period July 2, 2014 through July 9, 2014.

56. The claimant credibly testified that on July 1, 2014 he was at work pulling a power jack out of a truck when the handle turned and crushed his foot against the trailer wall. The claimant's testimony that this event occurred is corroborated by the credible testimony of the claimant's co-employee Ketterman who was working on the loading dock and heard a loud noise like the power jack had hit something. Ketterman also credibly testified that he saw the claimant who appeared to be in pain and was limping worse than he had prior to this incident. Moreover, the claimant immediately advised Ketterman that he had hurt his foot. The claimant's testimony is further corroborated by Ms. Chase's testimony that the claimant reported the foot injury to her on the morning of July 1, 2014. The claimant's testimony is further corroborated by the history of a left foot injury that he gave to Dr. Pineiro when she examined him on the afternoon of July 1, 2014.

57. The claimant proved it is more probably true than not that the foot injury of July 1, 2014 proximately caused temporary total disability for the period of July 2, 2014 through July 9, 2014. Dr. Pinero credibly diagnosed a "foot contusion" when she examined the claimant on July 1, 2014 and credibly opined this was a "separate work related injury." She also credibly opined that in light of the claimant's back pain and new foot and ankle injury he would not be able to return to work. The ALJ infers from Dr. Pinero's statement that the claimant's restriction from work was at least partially caused by the pain resulting from the foot contusion. Dr. Pinero credibly opined based on the history the claimant gave on July 9, 2014 that the foot had "returned to baseline." Dr. Pineiro's comment is corroborated by her July 22, 2014 note stating the foot and ankle injury had resolved and the claimant was suffering from no limitations associated with this incident.

58. The claimant failed to prove it is more probably true than not that he is entitled to an award of TTD benefits for the period of July 11, 2014 through July 23, 2014.

59. Dr. Pineiro's note of July 11, 2014 indicates the claimant was taken off of work for 24 to 48 hours because of withdrawal symptoms caused by his stopping his medication. This is consistent with the claimant's testimony that he chose to stop his medication because he was concerned about the effects of the medication. The ALJ finds that a preponderance of the evidence establishes the claimant's decision to stop the medication, which led in turn to withdrawal symptoms and Dr. Pineiro's release from work, constituted an intervening cause of the claimant's wage loss between July 11, and July 13, 2014. The claimant's decision to stop his medication after being warned of the possible consequences was not caused by the natural progression of the industrial injury, but was instead caused by the claimant's intervening decision to stop his medication.

60. Dr. Pineiro's note of July 21, 2014 establishes that the claimant was also off of work because of back symptoms which were "subjective." This is consistent with Dr. Pineiro's note of July 22, 2014 which states the claimant gave a history that he was unable to work because of back pain.

61. A preponderance of the credible and persuasive evidence establishes that the cause of the claimant's failure to perform the modified duty that was available to him between July 11, 2014 and July 23, 2014 was not disability caused by injury-related back pain, but was instead his own decision to stop working while providing his treating physicians exaggerated claims of back pain. In this regard the ALJ credits the opinions of Dr. Cebrian and Dr. Weingarten that the claimant has a history of malingering in the sense that he exaggerates his back pain. The opinions of these physicians are supported by the video surveillance depicting wide differences in the claimant's pain behaviors over a brief period of time. These opinions are further supported by evidence from Dr. Weingarten and Dr. Pinero that the claimant failed to give them complete histories of his pre-injury back pain and treatment. Moreover, Dr. Coester credibly opined the claimant's reports of symptoms are disproportionate to his MRI findings, Dr. Sacha credibly opined that the claimant's symptoms outweigh his findings and Dr. Pineiro credibly opined the claimant's subjective symptoms are not a good barometer of condition. Dr. Wunder assessed significant symptom magnification. Further, the claimant was admittedly able to perform restricted duty of a full-time basis for more than a month prior to suffering the foot injury on July 1, 2014.

62. A preponderance of the credible evidence establishes the claimant did not injure or reinjure his back on July 1, 2014. Chase and Ketterman credibly testified that when they spoke to the claimant on July 1 he did not report any new back pain. Dr. Pinero's report of July 1, 2014 does not document a new back injury, but instead states the claimant had sustained a new foot and ankle injury that he would need to report. Dr. Pinero did not state the claimant needed to report a new back injury. In fact, Dr. Pinero states the purpose of the July 1visit was to "recheck" the prior back injury. To the extent the claimant's testimony would permit the inference that the July 1, 2014 constituted a new back injury the ALJ finds that testimony is not credible.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY OF FOOT INJURY

The claimant contends he proved by preponderance of the evidence that on July 1, 2014 he sustained a compensable injury on July 1, 2014, and that this injury caused temporary total disability for the period of July 2, 2014 through July 9, 2014. The respondents contend the claimant's testimony concerning the foot injury and resulting disability are not credible. The ALJ concludes the claimant sustained a compensable left foot injury that proximately caused temporary total disability.

Section 8-41-301(1)(c), C.R.S., requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the alleged disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. See *Subsequent Injury Fund v. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986).

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

As determined in Findings of Fact 55 and 56 the claimant proved it is more probably true than not that on July 1, 2014 he sustained a left foot injury arising out of and in the course of his employment. As found, the ALJ credits the claimant's testimony that this injury occurred when he stumbled while pulling a power jack while working in a trailer. The incident occurred when the stumble caused the handle to turn and pinned the left foot against the side of the trailer. The claimant's testimony concerning this incident is corroborated by the credible testimony of Mr. Ketterman as well as the near contemporaneous reports of injury to Ketterman, Chase and Dr. Pineiro. Evidence and inferences inconsistent with these findings and conclusions are not credible and persuasive.

TEMPORARY TOTAL DISABLITY BENEFITS FOR PERIOD JULY 2, 2014 THROUGH JULY 9, 2014

The claimant contends that he proved the left foot injury caused temporary total disability entitling him to temporary total disability (TTD) benefits for the period of July 2, 2014 through July 9, 2014. The ALJ agrees with this argument.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an

ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As determined in Finding of Fact 57, the claimant proved it is more probably true than not that the foot injury of July 1, 2014 caused a period of temporary total disability from July 2, 2014 through July 9, 2014. Dr. Pineiro credibly diagnosed a foot contusion that totally disabled the claimant from work for the period of July 2, 2014 through July 9, 2014. Although Dr. Pineiro also attributed some of the claimant's inability to work to back pain, it is clear from her credible reports that she believed the foot injury played a substantial causative role in the claimant's inability to work during the disputed period of time.

MEDICAL BENEFITS

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

The claimant proved it is more probably true than not that he is entitled to compensation for the treatment that Dr. Pineiro provided for the claimant's foot injury of July 1, 2014. Based on the reports of Dr. Pineiro the ALJ finds that this treatment was reasonable and necessary to cure and relieve the effects of the injury.

TEMPORARY TOTAL DISABLITY FOR THE PERIOD OF JULY 11, 2014 THROUGH JULY 23, 2014

The claimant contends he proved he is entitled to an award of TTD benefits for the period of July 11, 2014 through July 23, 2014. The claimant argues that the MRI scans demonstrate "objective medical evidence of [his] low back injury" and that he has "suffered significant symptoms" with respect to the low back injury from the date of injury and continuing through July 23, 2014. He also cites the permanent impairment rating issued by Dr. Pineiro and Dr. Wunder's comment that the surveillance video documents "some level of back pain." The claimant also cites the fact that Dr. Pineiro took the claimant off of work on July 11, 2014 because of increased low back pain, and symptoms of opioid withdrawal. The respondents argue that Dr. Pineiro's decision to restrict the claimant from work was due to his unreliable subjective complaints, and that Dr. Pineiro subsequently admitted that the claimant's subjective complaints are not a good barometer of his disability or lack thereof.

Here it is undisputed, and the ALJ finds, that the claimant returned to modified employment and worked a regular shift on July 10, 2014. Therefore, the claimant's entitlement to TTD benefits ended and he carried the burden of proof to re-establish entitlement to TTD benefits commencing July 11, 2014. Section 8-42-105(3)(b), C.R.S. (TTD benefits end when the claimant returns to regular or modified employment).

In order to receive additional TTD benefits the claimant is required to prove that as of July 11, 2014 the industrial injury of November 15, 2013 caused additional wage loss. Where the evidence establishes that a wage loss is caused by an intervening event the claimant is not entitled to additional TTD benefits. *See Roe v. Industrial Commission*, 734 P.2d 138 (Colo. App. 1986); *Caraveo v. David J. Joseph Co.,* WC 4-358-465 (ICAO 2010); *Collinge v. Safeway,* WC 4-680-590 (ICAO 2007). The question of whether alleged disability is the result of the effects of the industrial injury or some intervening cause is one of fact for determination by the ALJ. *Collinge v. Safeway, supra.*

As determined in Findings of Fact 59 through 61, the claimant is not entitled to an award of TTD benefits for the period of July 11, 2014 through July 23, 2014. As found, a preponderance of the evidence establishes that during this period of time the claimant's wage loss was caused first by his personal decision to stop taking his medications so as to produce withdrawal symptoms. The remainder of his wage loss was caused by his decision to avoid performing modified duty by making exaggerated claims of back pain to his treating physicians. As found, the claimant's wage loss during this period of time was not caused by the effects of the industrial injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. The claimant sustained a compensable injury in WC 4-955-722.

3. As a result of the compensable injury in WC 4-955-722 the insurer shall pay temporary total disability benefits for the period of July 2, 2014 through July 9, 2014.

4. As a result of the compensable injury in WC 4-955-722 the insurer shall pay for reasonable and necessary medical expenses including those provided by Dr. Pineiro.

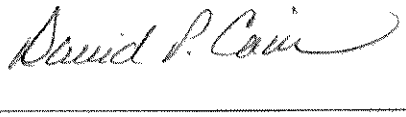
5. The claim for temporary total disability benefits from July 11, 2014 through July 23, 2014 is denied.

6. Issues not resolved by this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 13, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that employer is liable for penalties for failing to report an injury pursuant to Section 8-43-101(1)?

- Whether claimant has proven by a preponderance of the evidence that insurer is liable for penalties for failing to admit or deny liability in violation of Section 8-43-103(1)?

- Whether claimant has proven by a preponderance of the evidence that insurer is liable for penalties for failing to admit or deny liability in violation of Section 8-43-203?

- The parties stipulated prior to the hearing that claimant would be paid temporary total disability ("TTD") benefits for the period of July 24, 2013 through April 28, 2014 at an average weekly wage ("AWW") of $882.66 subject to the statutory offset for unemployment ("UI") benefits received by claimant.

FINDINGS OF FACT

1. Claimant was employed by employer as a hydro-operator III. Claimant sustained an admitted injury on July 23, 2013 when she tripped over a boulder while walking down to a lake in the course and scope of her employment with Employer. Claimant went to Mr. Way's office after the incident to report her injury. Claimant testified Mr. Way was on the phone when she arrived so she wrote a note to him and left the note on his desk. Claimant then went to her truck, drove back to the office, parked in the garage and went into the office to call the medical clinic to get medical treatment. Claimant testified that the medical clinic instructed claimant to go to the emergency room ("ER").

2. Claimant was evaluated at the ER on July 23, 2013 and referred for x-rays of the left wrist. Claimant was taken off of work through July 26, 2013 (the next Friday). Claimant called Mr. Way after leaving the ER and reported that she would be off of work the rest of the week. According to the WC 164 form signed on July 23, 2013, claimant was released to return to work without restrictions as of July 29, 2013. Claimant testified she dropped off a handwritten report of her injury to Employer on July 24, 2013.

3. Claimant testified she was scheduled to be off of work on July 27, July 28 and July 29, 2013. Claimant testified she returned to work on July 29, 2013 and was informed by Mr. Eddy that there was going to be restructuring and she was being laid off. Mr. Eddy advised claimant she could apply for unemployment.

4. Claimant returned to Dr. Britton on July 30, 2013 and reported she was still in a lot of pain. Claimant reported it was difficult for her to lift or grab anything and that is was hard for her to shampoo her hair. Dr. Britton diagnosed claimant with a left wrist sprain and provided claimant with work restrictions of 5 pounds for her left wrist.

5. Mr. Eddy testified at hearing that he became aware of claimant's injury when Mr. Way reported the injury to him on July 23, 2013. Mr. Eddy testified that he called Insurer and reported the injury to insurer after getting notice of the injury from Mr. Way. Mr. Eddy testified he did not speak to claimant after her injury until July 29, 2013 when he had claimant fill out an accident report. Mr. Eddy testified he was not aware of how to calculate the time lost for an injury.

6. Mr. Eddy testified he had a meeting with claimant on July 29, 2013 and informed claimant of the restructuring and the fact that she was being let go. Mr. Eddy testified that he later spoke with an adjuster from insurer and informed the adjuster that claimant was being let go for restructuring. Mr. Eddy testified that claimant was not at fault for her termination of employment.

7. Under cross-examination, Mr. Eddy acknowledged that the claims adjuster notes indicated that claimant had returned to work full duty as of July 24, 2013. Mr. Eddy noted that this was not true. Mr. Eddy confirmed that claimant could not perform her work with a five pound lifting restriction. According to the report of injury Mr. Eddy filled out for insurer, claimant returned to work on July 29, 2013 and Mr. Eddy reported that the injury was a lost time claim.

8. Ms. Woodrum testified on behalf of respondents. Ms. Woodrum is an adjuster for insurer. Ms. Woodrum testified that she began handling the claim in December 2013 and a different adjuster was assigned to the claim prior to that time. Ms. Woodrum testified that this claim was originally reported to insurer as a "not lost time" claim. Ms. Woodrum testified that when she took over the file in December 2013, the claim was still classified as a "not lost time" claim because claimant had been terminated for cause.

9. According to Ms. Woodrum, the claim notes document that as of July 29, 2013 claimant was terminated for performance and attendance issues and the employer was going to follow up with written confirmation. Ms. Woodrum testified that the written

confirmation was never received. Ms. Woodrum eventually filed a “medical only” general admission of liability on December 19, 2013.

10. Ms. Woodrum testified that when she filed the medical only general admission of liability she did not admit for temporary disability benefits because the notes in the file reflected that the claim was a no lost time claim due to the fact that claimant had been responsible for her termination of employment. Ms. Woodrum eventually filed a general admission of liability admitting for temporary disability benefits beginning May 14, 2014 after claimant underwent surgery and was restricted from work.

11. Respondents presented evidence of requests for information and medical releases that were not timely returned by claimant. However, the delay in receiving information from claimant does not provide a defense to the requirement in the statute that the respondents admit or deny liability in a case involving a lost time claim.

12. Respondents further argue that there was confusion initially in the claim regarding whether claimant was released to return to work and whether claimant was responsible for her termination of employment. However, based on the testimony of claimant and the testimony of Mr. Eddy, claimant did not return to work without restrictions prior to being terminated as a result of the restructuring. When claimant was terminated, she was under active restrictions from her treating physician that limited her ability to return to work.

13. Likewise, while insurer apparently believed that claimant was responsible for her termination of employment, there was no factual basis for this belief. Therefore, insurers reliance on the circumstances surrounding claimant’s termination as a basis for not filing the appropriate forms with the Division of Workers’ Compensation either admitting or denying liability is found to be not reasonable.

14. The ALJ finds, based on the evidence presented at hearing that employer reported the injury to insurer on July 23, 2013 when the first report of injury was filled out by employer and forwarded to insurer by Mr. Eddy. The ALJ finds that employer properly notified insurer based on the first report of injury that indicated that claimant had suffered a lost time injury.

15. However, Section 8-43-101(1), C.R.S. requires the employer to notify the Division of Workers’ Compensation of all injuries resulting in lost time from work in excess of three shifts. While employer appears to have relied on insurer to notify the Division of Workers’ Compensation of the lost time claim, there is insufficient evidence that Insurer notified the division of the injury pursuant to Section 8-43-101(1). Moreover, the plain language of Section 8-43-101(1) that places onus on the employer to notify the Division of Workers’ Compensation of lost time injuries does not allow the

employer to avoid the requirements of reporting lost time injuries by properly reporting said injuries to their insurance carrier.[1]

16. The ALJ therefore concludes that claimant has demonstrated that it is more probable than not that employer violated Section 8-43-101(1). Section 8-43-101(1) requires the employer to notify the division of injuries resulting in more than three shifts of lost time within ten (10) days of the date of the injury. Therefore, employer should have notified the Division of Workers' Compensation of the injury no later than August 2, 2013.

17. Likewise, Section 8-43-103(1), C.R.S. places the onus on employer to report an injury for which compensation and benefits are payable to the insurer and the Division of Workers' Compensation. While this section of the statute allows for the insurer to report the injury to the Division of Workers' Compensation, it does not absolve the employer of liability when the employer properly reports the injury to the insurer but does not properly report the injury to the Division of Workers' Compensation as required by the statute.

18. Crediting the testimony of Mr. Eddy, employer was aware as of July 29, 2013 that claimant had work restrictions that prohibited her from performing her job. Claimant was laid off pursuant to a restructuring, but that does not provide a defense to employer's obligation under Section 8-43-103(1) to notify the Division of Workers' Compensation of the injury as employer was aware as of that date that claimant had sustained a lost time injury. This is further evidenced by employer's first report of injury to insurer that acknowledges that the claim is a lost time injury.

19. The ALJ finds, based on the evidence presented at hearing, including the testimony of Mr. Eddy and the first report of injury entered into evidence, that insurer was notified of a lost time claim on July 29, 2013. Insurer may have incorrectly believed that the claim should have been classified as a non-lost time claim, but that does not provide a basis for their failure to either admit or deny liability pursuant to Section 8-43-203(1). The ALJ finds that this violation of the statute was resolved by virtue of the medical only general admission of liability filed by insurer on December 19, 2013.

20. Section 8-43-203(1), C.R.S. requires the insurer to notify the division as to whether liability was admitted or denied within twenty (20) days of the date the notice of injury was filed, or should have been filed with the Division of Workers' Compensation

[1] The ALJ notes that employer is likely in the best position to identify whether an injury has resulted in lost time to the injured worker, and this may explain why the statute places the onus on the employer to notify the Division of Workers' Compensation of injuries such as this. Regardless, however, the ALJ relies on the plain language of the statute and therefore, does not need to make any inquiry into the legislative intent of the statute to interpret it's meaning.

pursuant to Section 8-43-101, C.R.S. As indicated above, notice of the injury should have been provided to the Division of Workers' Compensation no later than August 2, 2013. The ALJ therefore concludes that claimant has demonstrated that it is more probable than not that insurer violated Section 8-43-203(1), C.R.S. for the period of August 22, 2013 (20 days after the period for which notice of the injury should have been filed with the Division of Workers' Compensation) until December 19, 2013 when the medical only general admission of liability was filed.

21. While Section 8-43-203(1), C.R.S., provides that notice to the employer is not considered notice to the insurer, the ALJ determines in this case that insurer was properly notified that this claim involved a lost time injury based on the first report of injury provided to insurer by Mr. Eddy and the testimony of Mr. Eddy at hearing. The mere fact that insurer believed claimant's case may involve a termination for cause scenario does not provide insurer with a basis to fail to admit or deny liability where the factual basis for such a defense is not established.

22. The ALJ notes that Section 8-43-203 allows that ALJ discretion to award a penalty of up to one day's compensation for each day respondents failed to notify the Division of Workers' Compensation and claimant of whether they were admitting or denying liability and respondents argue in their position statement that mitigating factors provide a basis for awarding less than a full days compensation for the violation of the statute. However, based on the evidence at hearing, the ALJ concludes that insurer knew or reasonably should have known that this case involved a lost time claim when employer did not provide insurer a written statement regarding claimant's termination of employment. Despite not receiving information that would support insurers' claim that claimant was responsible for her termination of employment, the evidence fails to establish that insurer made sufficient additional steps to obtain the appropriate information to support this position. As such, the ALJ finds that an award of one day's compensation is appropriate for this case.

23. Claimant argues in her position statement that the penalty period should run through May 14, 2014, the date the general admission of liability was filed admitting for temporary disability benefits. However, nothing in Section 8-43-203 requires the insurer to admit for temporary disability benefits. Therefore, the violation is ended by the date the medical only general admission of liability is filed (December 19, 2013).

24. Both claimant and respondent have made arguments in their position statements regarding potential penalties under Section 8-43-304(1), C.R.S. However, this penalty issue was not identified as an issue for hearing at the commencement of the hearing. Likewise, the affirmative defenses raised by respondents in their position statement were not addressed at the commencement of the hearing. The ALJ has reviewed the file in light of the issues raised by the parties in their position statements to

determine if such issues could have been tried by consent, but cannot, based on the statements made at hearing and the issues identified on the application for hearing and response to the application for hearing, make a finding that this issue was tried by consent. Due to the fact that there are issues with regard to whether this issue was properly identified at hearing and in the application for hearing, along with affirmative defenses raised by respondents, the ALJ determines that the issue is not properly before the court for resolution in this Order.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. Section 8-43-101(1), C.R.S., states in pertinent part:

> Every employer shall keep a record of all injuries that result in … lost time from work for the injured employee in excess of three shifts or calendar days.... Within ten days after notice or knowledge that an employee has contracted such … lost-time injury to an employee … the employer shall, upon forms prescribed by the division for that purpose, report said … lost-time injury … to the division. The report shall contain such information as shall be required by the director.

4. As found, claimant has proven by a preponderance of the evidence that employer was aware that claimant sustained a lost time injury and failed to report said injury to the Division of Workers' Compensation as required by the statute. As found,

the ALJ credits the testimony of Mr. Eddy and the first report of injury completed by employer that acknowledged that claimant had sustained a lost time injury to establish that employer was aware of claimant's lost time injury.

5. As found, while employer appears to have relied on insurer to provide the appropriate paperwork reporting the injury to the Division of Workers' Compensation, nothing in the statute provides a defense to the employer for the insurer's failure to notify the Division of Workers' Compensation of a lost time injury. Instead, the statute places the onus on the employer to notify the Division of Workers' Compensation of all lost time injuries. The fact that employer may have properly and timely reported the injury to insurer does not provide a defense to requirement of the statute.

6. Section 8-43-103(1), C.R.S., states in pertinent part:

> Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the division and insurance carrier, unless the employer is self-insured, within ten days after the injury…. If no such notice is given by the employer, as required by articles 40 to 47 of this title, such notice may be given by any person. Any notice required to be filed by an injured employee or, if deceased, by said employee's dependents may be made and filed by anyone on behalf of such claimant and shall be considered as done by such claimant if not specifically disclaimed or objected to by such claimant in writing filed with the division within a reasonable time. Such notice shall be in writing and upon forms prescribed by the division for that purpose and served upon the division by delivering to, or by mailing by registered mail two copies thereof addressed to, the division at its office in Denver, Colorado. Upon receipt of such notice from a claimant, the division shall immediately mail one copy thereof to said employer or said employer's agent or insurance carrier.

7. As found, claimant has proven by a preponderance of the evidence that she provided notice to employer of her injury on July 23, 2013. As found, the testimony of claimant and Mr. Eddy and the evidence at hearing establish that notice of the injury was given to employer on July 23, 2013. As found, employer promptly notified insurer of the injury and, by no later than July 29, 2013, of the fact that the injury was a lost time claim. Insurer mistakenly believed that either that the claimant had been returned to work without restrictions, or that she had been responsible for her termination. However, neither of these issues provide a defense to employer's responsibility to notify the Division of Workers' Compensation of claimant's injury where employer is aware that claimant had not returned to work and was not responsible for her termination of employment.

8. Section 8-43-203, C.R.S. states in pertinent part:

> (1)(a) The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee or, if deceased, the decedent's dependents within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for the purpose of this section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier. The employer or the employer's insurance carrier may notify the division electronically….
>
> (2)(a) If such notice is not filed as provided in subsection (1) of this section, the employer or, if insured, the employer's insurance carrier, as the case may be, may become liable to the claimant, if the claimant is successful on the claim for compensation, for up to one day's compensation for each day's failure to so notify; except that the employer or, if insured, the employer's insurance carrier shall not be liable for more than the aggregate amount of three hundred sixty-five days' compensation for failure to timely admit or deny liability. Fifty percent of any penalty paid pursuant to this subsection (2) shall be paid to the subsequent injury fund, created in section 8-46-101, and fifty percent to the claimant.

9. As found, claimant has proven by a preponderance of the evidence that a report should have been filed by August 2, 2013. As found, claimant has proven by a preponderance of the evidence that employer was aware that claimant had sustained a lost time injury on July 23, 2013. As found, claimant has proven by a preponderance of the evidence that insurer failed to timely admit or deny liability within twenty days of the date the report should have been filed.

10. As found, claimant has proven by a preponderance of the evidence that insurer did not file with the Division pursuant Section 8-43-203 notice of whether liability was admitted or denied until December 19, 2013. As found, claimant has proven by a preponderance of the evidence that the employer or insurance carrier may be liable for one day's compensation for the period of August 22, 2013 through December 19, 2013 as a penalty for their failure to properly admit or deny liability. As found, 50% of the penalty shall be paid to claimant and 50% to the subsequent injury fund as required by statute.

ORDER

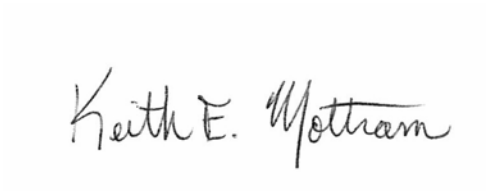
It is therefore ordered that:

1. Insurer shall pay claimant one day's compensation, based on claimant's stipulated AWW, for the period of August 22, 2013 through December 19, 2013, pursuant to Section 8-43-203(2)(a). As required by statute, 50% of this payment shall be made to claimant and 50% to the subsequent injury fund pursuant to Section 8-46-101.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 5, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

The issues for determination are:

1. Whether the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her low back on or about January 1, 2011;

2. If so, whether the respondents are responsible for medical benefits incurred prior to the claimant reporting the claim on December 13, 2013 as a work-related injury or occupational disease;

3. If so, and the claimant is entitled to temporary total disability benefits, whether there is a reduction of benefits for the claimant's failure to timely report the claim until December 13, 2013; and,

4. If so, is the claimant barred from recovery based on the statute of limitations since the claimant indicates that her injury began January 1, 2011 and did not report a claim until December 13, 2013, greater than two years after she knew or should have known the seriousness of her condition?

Based upon the findings and conclusion below that the claim is not compensable, the ALJ does not address the remaining issues.

STIPULATIONS

The parties stipulated to the following issues:

1. The average weekly wage (AWW) is $911.77 with a temporary total disability (TTD) rate of $606.85 per week.

2. The right of the respondents to offset for short-term and long-term disability benefits which are noted in respondents' exhibit packet, Exhibit SSS and TTT.

3. Short-term disability was paid to the claimant from December 2, 2013 through May 24, 2014 and long-term disability was paid to claimant from May 24, 2014

through September 25, 2014 and possibly continuing should the claim be deemed compensable.

FINDINGS OF FACT

1. The claimant worked at the respondent-employer's hospital from 2003 until the fall of 2013 as a respiratory therapist. She is currently considered to be on a per diem basis.

2. As part of claimant's duties as a respiratory therapist, she cared for 15 to 20 patients per day providing respiratory treatment. Her duties included positioning patients, responding to codes, and pushing a respiratory cart which weighed approximately 50 pounds.

3. The claimant opined that maneuvering the cart in and out of the elevators was difficult. She testified that she had to lift the cart in and out of the elevator. However, Larry Benner, claimant's supervisor, testified the carts were not difficult to maneuver and if necessary, one would tilt the cart to exit the elevator. He further testified that the initial force to initiate movement of the cart was 10 to 20 pounds.

4. The claimant testified that as a result of her job duties, she sustained a back injury which caused left leg pain radiating to her ankle. The claimant could not identify a specific time or activity in which her back pain actually occurred.

5. The claimant did not report to a supervisor that she had back pain or problems as related to her job duties. The claimant did not request a change in her job duties or accommodations in her job duties prior to her leaving her full-time employment in 2013.

6. The claimant did not file a worker's claim for compensation until December 13, 2013, indicating a date of injury of January 1, 2011. The worker's claim for compensation was not filed until the claimant was informed that her FMLA had run and that the claimant would be placed on PRN status.

7. The claimant owns horses and had previously been engaged in riding until recently.

8. The claimant has a long history of back problems:

9. January 16, 1995 – Her back problems relate back to a workers' compensation injury due to heavy lifting on the job. As a result, the claimant had severe back pain with inability to move and presented in a wheelchair. Her diagnosis was acute back pain and sacroiliitis.

10. Between 1995 and 2010 the claimant was seen in excess of a dozen times for complaints of severe back pain.

11. August 15, 2011 – It was noted that she had sacroiliac pain from an old injury and requested an injection. She was using a TENS Unit daily and was being prescribed Vicodin.

12. September 21, 2011 – The claimant received a sacroiliac injection and continued to receive treatment for a diagnosis of sciatica and SI joint dysfunction. Medication consisted of Lidoderm patches and Vicodin.

13. March 23, 2012 – The claimant wanted an SI joint injection. History provided was that she had a back injury 15 years ago with a recent exacerbation.

14. July 20, 2012 – The claimant had extreme back pain since yesterday from an old injury. She had pain from the left SI joint, down the posterior leg, to her foot. She did note pushing a cart was flaring her back more than usual.

15. July 31, 2012 – The claimant had received a trigger point injection which gave her temporary relief.

16. August 6, 2012 – MRI showed a large left paracentral L5-S1 disc herniation with left L5 and bilateral S1 nerve root impingement. She noted a history of back and leg pain for 1-2 years.

17. 2012 – She was provided with epidural steroid injections in September and December.

18. August 21, 2012 – The claimant asked to be released to work without restrictions and she wanted her paperwork "fudged" in order to return to work. Her diagnosis in 2012 was low back pain/sacroiliac joint inflamed.

19. The claimant returned to work performing her normal job duties without accommodations.

20. On July 23, 2013, claimant was seen at the emergency department. There is no indication from the medical record that the claimant reported this problem as related to her work or her work duties.

21. On August 14, 2013, the claimant was seen by Dr. Michael Brown. His note indicated she had severe recurrence of back pain three weeks ago without benefit from an epidural injection. There was no history of a work-related problem and he specifically notes that coughing and sneezing aggravate her pain. She also complained of numbness and tingling in her left hand.

22. He recommended an MRI which was performed on August 22, 2013. There was no significant difference between the August 6, 2012 and the August 22, 2013 MRI's.

23. Dr. Brown performed surgery consisting of a microdiscectomy on August 27, 2013. The claimant did fairly well until approximately October 14, 2013. She indicated that she had been riding in a car for approximately three hours and was having severe left gluteal pain extending into her leg.

24. An MRI was again performed on October 31, 2013 which revealed a recurrent disc protrusion. The claimant underwent a repeat microdiscectomy at L5-S1 on the left.

25. The claimant returned to work between the surgeries full-duty without restrictions and without accommodations.

26. The claimant underwent her third surgery consisting of a fusion on August 6, 2014.

27. Dr. Rauzzino saw the claimant on behalf of the respondents and issued a report dated August 2, 2014. Dr. Rauzzino reviewed all of the records from January 16, 1995 forward. Dr. Rauzzino testified that most disc problems occur idiopathically without injury. He further testified that disc herniations occur due to heavy lifting or axial loading. Dr. Rauzzino testified that horseback riding would create axial loading. Based on his review of the medical records, it was his opinion that the claimant had a disc herniation as early as 1997 and the progression of this disc expressed itself in symptomology consistent with leg pain. It was his opinion that SI joint problems do not manifest symptoms of leg pain or radiculopathy.

28. Dr. Rauzzino noted there was lack of documentation to suggest that the claimant's back problems occurred while at work for the respondent-employer or during

the performance of her duties as a respiratory therapist. It was his opinion that her work duties did not cause the disc herniation or aggravate or accelerate the disc herniation. It was his opinion that her problems are due to degenerative disc disease and the natural progression of the underlying disc herniation relating back to 1997. He also noted there was no specific event or activity which the claimant noted to account for the acute onset of low back pain radiating to her left leg, while she was at work or performing her work duties. Dr. Rauzzino did not believe that pushing a cart would cause or aggravate a herniated disc. He opined that the disc herniation progressed over time which was consistent with her medical history. He testified that any activities to include activities of daily living would increase her back pain.

29. Dr. Brown testified in deposition that he did not think that claimant's problems in 1995 were the same as the problems he saw her for in 2013. However, he conceded that he did not review any prior medical records nor did he know the history of her back complaints. However, he opined that the history provided to the medical providers was important in determining causation of an injury.

30. Dr. Brown further testified that without a specific episode which caused the disc herniation, it was unlikely related to claimant's work activities. He opined that her pain would be exacerbated by pushing the cart but also anything she did would likely increase her pain. He stated that it is the opinion of neurosurgeons that the discs can herniate idiopathically and without an injury. This statement and opinion was consistent with that of Dr. Rauzzino.

31. The ALJ finds that the opinions of Dr. Rauzzino are more credible than other medical opinions to the contrary.

32. The ALJ finds that the claimant has failed to establish that it is more likely than not that she suffered an injury arising out of and in the course of her employment with the respondent-employer.

CONCLUSIONS OF LAW

1. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the

burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

2. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

3. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

4. A pre-existing disease or susceptibility to an injury does not disqualify a claim if the employment aggravates, accelerates, or combines with a pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Renta*, 717 P.2d 965 (Colo. App. 1995).

5. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Indus. Claim Appeals Off.*, 53 P.3d 1192, 1197 (Colo. App. 2002).

6. When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The decision need not address every item contained in the record. Instead, incredible evidence, unpersuasive testimony, evidence or arguable inferences may be implicitly rejected. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo.App. 2000).

7. The ALJ concludes that the claimant has failed to provide sufficient medical or lay evidence that her back condition is related to her job duties.

8. The credible medical evidence and opinions indicate that the claimant's condition is not work related. As found above, the ALJ concludes that the opinions of Dr. Rauzzino are credible and entitled to persuasive weight.

9. The claimant has failed to establish by a preponderance of the evidence that the claimant's carpal tunnel syndrome and her lateral epicondylitis, arose out of and in the course of her employment with the respondent-employer.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 5, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant is entitled to conversion of a scheduled impairment rating for hearing loss to impairment of the whole person.

II. Whether Claimant's scheduled impairment rating was properly limited to monaural left ear hearing loss.

III. Whether Claimant is entitled to disfigurement benefits pursuant to § 8-42-108(1) as a consequence of his need to wear a hearing aid secondary to his admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long time employee of the Colorado Springs Police Department (CSPD), a separate department within the Self-Insured Respondent. Claimant has worked for Employer for approximately 14 years. As a patrol sergeant with CSPD, 50% of Claimant's duties involve administrative tasks. The remaining 50% of his time is spent working as a patrol officer where Claimant is subjected to traffic noise and sirens. Claimant is also exposed to the resonance and sound associated with gunfire while engaged in target practice required for his job. He also enjoys hunting with firearms. Claimant uses ear protection while shooting on the firing range; however, does not when hunting.

2. Prior his hire with the CSPD, Claimant worked as a patrol officer in Kansas where he had significant contact with traffic noise, sirens and gunfire while engaged in target practice.

3. Upon his appointment to the CSPD, Claimant's hearing was tested on October 24, 2000. Claimant's October 24, 2000 hearing test demonstrated minimal right ear hearing loss.

4. On or around October 24, 2013, Claimant reported increased difficulty with his hearing, especially the left ear, which he attributed to his use of ibuprofen to treat a separate work related injury.

5. Claimant underwent a hearing test at the City of Colorado Springs Occupational

Health Clinic on October 24, 2013, which demonstrated a "moderate loss in hearing." A work injury claim was taken and Claimant was referred to Dr. Joseph Hagarty by Employer's representative, Joanie Butero-Gay.

6. Dr. Hagarty evaluated Claimant on December 4, 2013 at which time a repeat audiogram was preformed. Claimant's December 4, 2013 audiogram demonstrated "minimally impaired" hearing on the right side and a "fairly large mid frequency" left ear hearing loss. In his report from December 4, 2013, Dr. Hagarty opined that Claimant's right sided hearing loss had remained "very similar over the past decade." He also opined that Claimant was suffering from "left noise induced hearing loss."

7. Liability for Claimant's left ear hearing loss was accepted by the Self-Insured Respondent.

8. Dr. Hagarty recommended a left ear hearing aid (HA) and diligent ear protection. Claimant was placed at maximum medical improvement (MMI) and assigned impairment by Dr. Hagarty. Dr. Hagarty's impairment calculation reflects that Claimant sustained 24% monaural hearing loss (impairment) in the left ear. As the average threshold readings for hearing in the right ear were less than 25 dB, Claimant had no ratable hearing loss in the right ear. (See Claimant's Exhibit 8, Bates Stamp page 35 and Claimant's Exhibit 9, Section 9.1a ¶ 7)[1] Consequently, the ALJ finds that Claimant has sustained a monaural hearing loss only. According to Dr. Hagarty's impairment rating report, 24% monaural hearing impairment equates to a 3% binaural hearing impairment[2]. Dr. Hagarty did not reflect the relationship of binaural hearing impairment to impairment of the whole person.

9. Claimant requested a Division Independent Medical Examination (DIME) which was completed by Dr. William S. Griffis on June 30, 2014. Dr. Griffis agreed with Dr. Hagarty's date of MMI. He also completed an impairment rating using Claimant's previously recorded audiogram readings and Tables 1, 2 and 3 of Chapter 9 of the *AMA Guides to the Evaluation of Permanent Impairment Third Edition (Revised)*(hereinafter the *AMA Guides*). Using the readings from Dr. Hagarty's audiogram, Dr. Griffis reached the same result concerning Claimant's monaural hearing loss as did Dr. Hagarty. Dr.

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[1] Paragraph 7 of section 9.1a provides that "If the average hearing level at 500, 1,000, 2,000, and 3,000 Hz is 25 dB (ANSI-1969) or less, no impairment is presumed to exist in the ability to hear everyday sounds under everyday listening conditions. In this case, Claimant's average threshold reading for the right ear was 23 dB.

[2] According to Section 9.1a ¶ 8 a purely monaural hearing impairment "should be converted to binaural hearing impairment" using the formula provided for in the paragraph, with 0% hearing impairment for the better ear. Table 3 of Chapter 9 is derived from this formula. The formula is expressed as:

$$\text{Binaural Hearing Impairment, (\%)} = \frac{5\times\% \text{ hearing Impairment of better ear}}{6} + \%\text{ hearing impairment of poorer ear}$$

In this case, Dr. Hagarty calculated Claimant's binaural hearing loss as follows: 0% + 16dB ÷ 6 = 2.6, which Dr. Hagarty rounded up to 3%.

Griffis also calculated Claimant's binaural hearing loss using the formula provided for by Chapter 9, § 9.1a ¶ 8; however, the ALJ finds that Dr. Griffis expressed Claimant's binaural hearing loss as 3% WP or whole person impairment. Dr. Griffis did not apportion any of Claimant's hearing loss to prior exposure(s) for the following reasons: insufficient medical information, the left ear hearing loss had not be treated previously and the left ear hearing loss had not been independently disabling at the time of Claimant's October 24, 2013 injury.

10. On July 23, 2014, Respondent filed a Final Admission of Liability (FAL) admitting to 24% scheduled impairment for monaural left ear hearing loss. While the FAL took a position regarding disfigurement benefits, it noted simply $0.00 in the benefit summary. Claimant objected to the FAL on August 21, 2014 and filed an application for hearing endorsing the issues of disfigurement and permanent partial disability (PPD) benefits. Claimant was careful to note in his application for hearing that he accepted the impairment rating by the DIME physician, but sought to convert the 24% scheduled rating to the 3% whole person rating expressed by Dr. Griffis on the grounds that he had sustained "functional impairment" beyond his monaural hearing loss. Claimant reiterated this position at hearing. Consequently, the ALJ finds Claimant's burden of proof concerning the "conversion" of PPD to be subject to a preponderance of the evidence standard. Absent conversion of his scheduled impairment to whole person impairment, Claimant asserted that his scheduled impairment should have been calculated at 139 weeks as provided for under C.R.S. § 8-42-107(2)(hh) as opposed to 35 weeks as provided for under C.R.S. § 8-42-107(2)(ii).

11. Claimant testified that since his injury, he is cognizant to position co-workers to his right side so their speech is directed into his right ear even with use of his hearing aid. According to Claimant, his hearing aid amplifies background noise making it more difficult to converse in crowded rooms and discern where specific sounds are coming from. Claimant testified that cold weather causes ringing in his ear and he must put his seat belt on before starting vehicles because the dinging sound associated with ignition, in the absence of being pre-belted, is particularly amplified, painful and bothersome. Claimant testified that he must purchase replacement batteries frequently and take the device out when he is on the shooting range. Despite the aforementioned adjustments, Claimant admitted during cross examination that he has returned to full duty work and is able to perform all functions required of his job and daily living. Based upon the evidence presented, the ALJ finds that, despite his hearing loss, Claimant has not experienced a decreased capacity to meet his personal, social or occupational demands. Accordingly, the ALJ finds that Claimant's "functional impairment" is limited the hearing in his left ear.

12. Claimant has failed to prove by a preponderance of the evidence that he has sustained functional impairment beyond the left ear which would warrant conversion of his 24% scheduled impairment rating to impairment of the whole person. Accordingly, the ALJ finds that Claimant sustained scheduled impairment only as a result of his October 24, 2013 work injury.

13. The ALJ is not persuaded by Claimant's assertion that his scheduled impairment

was improperly limited to one ear. Scheduled impairment for hearing loss is enumerated on the schedule set forth in subsection (2) of § 8-42-107, C.R.S. According to that schedule, injuries causing total deafness in both ears entitle such injured employees to receive compensation for a total of 139 weeks. Conversely, injuries which cause total deafness in one ear limit compensation to a period of 35 weeks. Claimant asserts that his scheduled impairment should have been calculated on the basis of 139 weeks (total deafness of both ears). As found at Findings of Fact, ¶¶ 8-9 above, Claimant has partial unapportioned[3] left monaural hearing loss only. While the hearing in Claimant's right ear is "minimally impaired", impairment for this loss is not measurable because it falls below the 25 dB threshold to qualify as an impairment in the ability to hear everyday sounds under everyday listening conditions. Moreover, simply because Dr. Hagarty and Dr. Griffis indicated that Claimant has 3% binaural impairment does not mean that Claimant suffers from binaural hearing loss.[4] To the contrary, the *AMA Guides* simply provide that purely monaural hearing impairments should be converted to binaural hearing impairment and converted further to impairment of the whole person for inclusion in the impairment rating report. In this case, Claimant's hearing loss is limited to his left ear. Consequently, the ALJ finds that compensation for Claimant's scheduled impairment was properly limited to the category of "total deafness of one ear" entitling him to receive compensation for 35 weeks as provided pursuant to § 8-42-107(2)(ii), C.R.S.

14. Claimant wears an artificial hearing device made up of two parts; a small clear plastic tube and a small gray battery pack containing a small antenna which Claimant places behind his left ear. While subtle, the device is visible, especially when viewed from the side and rear. Claimant's use of this artificial device constitutes an alteration of the "natural appearance" of his head. Consequently, the ALJ finds Claimant's use of a hearing aid to constitute a disfigurement contemplated by § 8-42-108(1), C.R.S. The ALJ finds that Claimant has proven his entitlement to disfigurement benefits by a preponderance of the evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. When a claimant's injury is listed on the schedule of disabilities, the award for

[3] While Dr. Hagarty apportioned the percentage of Claimant's hearing loss to non-occupational factors, the evidence presented establishes that Respondent's accepted liability for Dr. Griffis unapportioned impairment rating.

[4] The ALJ finds that Dr. Griffis' expression that Claimant had a 3% whole person impairment is a clerical error and that he likely intended to reflect that Claimant had 3% binaural hearing loss as did Dr. Hagarty since he not reference that he utilized Table 4 of the AMA Guides to reflect the relationship of binaural hearing impairment to impairment of the whole person in his DIME report. Since Claimant's impairment is limited to scheduled monaural hearing impairment only, the ALJ finds Dr. Griffis error immaterial.

that injury is limited to a scheduled disability award. Section 8-42-107(1)(a), C.R.S. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. Here, conversion of Claimant's scheduled impairment to impairment of the whole person is not warranted. While Claimant's left ear hearing loss has resulted in simple adjustment to some activities, it has not resulted in any decreased capacity to meet his personal, social or occupational demands. Consequently, the ALJ concludes that Claimant has not sustained a "functional impairment" of bodily function not listed on the scheduled of disabilities which would warrant conversion.

B. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant wears a hearing aid which alters the natural appearance of his head constituting a disfigurement as provided for by Section 8-42-108 (1), C.R.S. *See also*, *Jane M. Felix v. The Griffith Center, Inc.,* W.C. 3-972-633 (ICAO January 12, 1998).

ORDER

It is therefore ordered that:

1. Claimant's request for conversion from scheduled impairment to impairment of the whole person is denied and dismissed.

2. Claimant's request for scheduled impairment calculated on the basis of 139 weeks is denied and dismissed.

3. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Insurer shall pay Claimant $1,500.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 12, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Did the claimant prove by a preponderance of the evidence that he sustained a compensable injury or occupational disease proximately caused by the performance of service arising out of and in the course of his employment?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits for the March 27, 2014 to September 5, 2014?

- Did the claimant prove by a preponderance of the evidence that he is entitled to an award of reasonable, necessary and authorized medical benefits for treatment of his low back condition?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 10 and 12 through 13 were admitted into evidence. Respondents' Exhibits A through M were admitted into evidence.

2. The claimant's date of birth is January 20, 1959. Since 1990 the claimant has worked on and off for the employer as a ceiling installer. The claimant was so employed on September 2, 2013.

3. At the hearing on November 25, 2014 the claimant testified as follows. On September 2, 2013 he was installing ceiling tiles at a parking garage on Logan Street. This job required him to lift bundles of ceiling tiles from the floor and place them on a scaffold that was approximately 5 feet above the floor. The bundles contained 4 tiles and the bundles weighed 70 pounds. He would load approximately 20 bundles onto the scaffold and then put on stilts. Once on stilts he would install insulation and tiles. This portion of the work required him to reach down to the scaffold, pick up a tile and then lift it overhead to install in the roof.

4. The claimant further testified as follows. In March 2013 he tore his right rotator cuff. As a result of this injury and the physical circumstances of the Logan Street job he was required to modify the way he performed his work. The claimant explained that in order to lift the tiles to the scaffold he bent over, picked the tiles up with his left arm and then used his back to stand and lift the tiles. This required much more use of his back than was normal. When installing ceiling tiles he would get the tile to shoulder height on the right and then use his left arm to lift the tile up and slide it into place.

Because the floor of the garage sloped downwards it was a further to reach to the ceiling on the downhill side of his stilts.

5. The claimant testified as follows concerning the morning of September 2, 2013. He loaded the scaffold with tiles on three separate occasions. The claimant began to experience a tingling in his right leg. The claimant was not certain when this sensation began but it became very prominent at about 11:00 a.m. when he was loading tiles on the scaffold. The claimant described numbness as running from the middle of the calf into the foot. He had never experienced this type of numbness before. The claimant also mentioned he had pain in the leg. The claimant told his supervisor that he was not "feeling right" and was going home.

6. The claimant testified that he had a motorcycle accident in 2010 which caused rib and head injuries but no low back injury. He testified he had no back pain between 2010 and September 2, 2013. In fact the claimant testified that he had no back pain at all prior to September 2, 2013 except for undergoing some chiropractic treatments sometime in 1982, 1983 or 1984. The claimant testified he did not experience any back pain from September 2, 2013 until he underwent surgery on October 4, 2013 and the pain medications wore off.

7. The claimant testified as follows concerning the events of September 3, 2013. He woke up and felt no better than he did the day before. He then called the employer to give notification he would not be into work. At approximately 1:00 p.m. he lay down and then got up at 3:00 p.m. When he got up his right foot was paralyzed and his right leg was numb from the hip to the foot. The claimant then went to Swedish hospital at approximately 11:00 p.m.

8. Will Schell testified as follows. He has been the vice president of the employer for 20 years. He is familiar with the claimant's job duties and has performed them himself. The bundles of tile used by the claimant weigh approximately 32 pounds; thus each tile weighs 8 pounds. Mr. Schell estimated that the claimant would lift 40 bundles per day, but stated this varies greatly between workers. The claimant was not lifting 70 pounds of material 20 or more times per day, but he occasionally lifted 70 pounds.

9. Mr. Schell further testified as follows. The claimant never reported to Mr. Schell that he sustained a work related back injury in September 2013. Mr. Schell has no recollection that in September 2013 the claimant asked to be off work because of a work related back injury. On October 3, 2013 the claimant came to Mr. Schell and said he was going to have back surgery under the employer's private health insurance. On October 3 the claimant did not tell Mr. Schell that his back condition was work related.

10. Records from the Swedish Medical Center emergency room (ER) reflect that the claimant arrived at 47 minutes after midnight on September 5, 2013. The claimant gave a history that at about 4:00 p.m. "the day before yesterday" he experienced the abrupt onset of weakness on the right side of his face, mild right arm weakness and mild right leg weakness. He reported tingling in the right arm and right

leg and that he had trouble walking. The claimant was admitted to the hospital with a "clinical impression of cerebrovascular accident." The claimant underwent an MRI of the brain that was negative. Dr. Jeffrey Wagner, M.D., opined the claimant probably had not had a stroke but Dr. Wagner was suspicious of a seizure.

11. On September 5, 2013 while the claimant was in the hospital he was evaluated by Charles Koftan, M.D. Dr. Koftan notes a history that "around 12 noon" on September 4, 2013 the claimant noticed the onset of right foot weakness and trouble walking. The claimant also reported 2 days of low back pain. Dr. Koftan noted the claimant had undergone various tests for a stroke but all tests were normal "except for the MRI of the lumbosacral spine." Dr. Koftan recorded that the lumbar MRI showed "degenerative changes at the L4-L5 lumbar regions with diffuse disk bulge and osteophytic ridge and possible small left paracentral herniation extending inferiorly." Dr. Koftan opined the lumbar MRI findings could explain the claimant's right lower extremity symptoms of weakness, altered gait and foot drop. Dr. Koftan wanted to refer the claimant to neurosurgery for an evaluation but the claimant declined because he wanted to be discharged from the hospital. Dr. Koftan discharged the claimant on September 6, 2013 with instructions to see his primary care physician (PCP), Richard Jolly, D.O., for a possible neurosurgery referral.

12. The Swedish medical records of September 5 and 6, 2013 do not indicate the claimant gave any history that his right lower extremity symptoms began while he was working as a ceiling tile installer on September 2, 2013.

13. Dr. Jolly examined the claimant on September 10, 2013. The claimant gave a history of the sudden onset of weakness including the right foot, right forearm and fingers of 4 to 6 days' duration. The history contains no indication that the claimant reported the symptoms began while he was at work. Dr. Jolly referred the claimant for a neurosurgical evaluation and neurological evaluation.

14. The claimant testified that 3 or 4 days after he got out of the hospital he had a conversation with Elena Schell, who was at that time the majority owner of the employer. The claimant stated that he advised Ms. Schell that his back problem happened while he was on the job at the Logan Street parking garage. The claimant stated that Ms. Schell replied she did not know why he was trying to make a workers' compensation claim when private health insurance was already paying for treatment of his back condition.

15. On September 16, 2013 the claimant underwent surgery to repair the right rotator cuff injury.

16. On October 1, 2013 Derrick Cho, M.D., performed a neurosurgical consultation pursuant to the referral from Dr. Jolly. The claimant reported chief complaints of back pain and right foot weakness. Dr. Cho noted a history that on September 5, 2013 the claimant experienced the sudden onset of numbness in the right side of his body along with weakness of the right lower extremity. The note contains no mention that these symptoms began while the claimant was at work. Dr. Cho examined

the claimant and reviewed the lumbar MRI. He noted the MRI showed "L4-5 disc collapse with a right eccentric disc herniation" causing "important compromise of the L5 nerve root." Dr. Cho assessed a lumbar herniated disc including radiculopathy and recommended the claimant undergo surgery.

17. On October 2, 2013, George Kohake, M.D., performed a "followup recheck" of the claimant's right shoulder. Dr. Kohake noted the claimant's right rotator cuff, associated with the March 2013 injury, was repaired on September 16, 2013. Dr. Kohake further noted that the claimant told him he was "scheduled to have a nonwork-related lumbar spine surgery done this Friday on the date of October 4, 2013, in which he is going to have one or two levels of his lumbar vertebrae fused, as well as a decompression, because he has nerve impingement on the right side with a drop foot on the right leg."

18. On October 4, 2013 Dr. Cho performed surgery described as a minimally invasive right L4-5 laminoforaminotomy, medial facetectomy and microdiscectomy for nerve root decompression.

19. On December 16, 2013 the claimant completed a claim for compensation. On this claim form the claimant wrote that he sustained an injury or disease involving his back and right foot on September 2, 2013. He also wrote that he reported this injury to the employer on September 9, 2013.

20. On April 25, 2014 Allison Fall, M.D., performed an independent medical examination (IME). Dr. Fall is board certified in physical medicine and rehabilitation and is level II accredited. Dr. Fall took a history from the claimant, performed a physical examination and reviewed medical records. The claimant gave a history to Dr. Fall that he was at work on September 2, 2013 and "felt weird" around 11:00 a.m. Specifically he reported he experienced tingling in his right leg and foot. The claimant advised that his work required him to stand on stilts and lift insulation and tiles overhead. The tiles weighted 25 pounds. He advised Dr. Fall he had no back pain prior to undergoing surgery. Dr. Fall noted that the September 2013 lumbar MRI showed multilevel degenerative changes including a "mild disc bulge/osteophyte ridge and mild facet degenerative changes at L4-5" with a small paracentral disc herniation encroaching on the exiting L5 nerve roots. She also noted that on November 15, 2013 the claimant underwent lumbar spine x-rays that showed "pronounced degenerative change, most pronounced at L4-5 and L5-S1" with loss of disc space height at and endplate degenerative change "most pronounced at L4-5."

21. In her April 25, 2014 report Dr. Fall assessed the claimant as being status post "L4-5 decompression and microdiscectomy for right foot drop." Dr. Fall opined to a reasonable degree of medical probability that the onset of the foot drop, "which arose when he awoke from a nap, was not work-related." She explained that there was "no traumatic event at work" and the claimant had "significant underlying, degenerative changes, a history of numerous falls, and significant motorcycle accident." Dr. Fall noted the "initial medical records" did not indicate there had been a work related injury.

22. On September 5, 2014 L. Barton Goldman, M.D., performed an IME. Dr. Goldman was qualified as an expert in physical medicine and rehabilitation and is level II accredited. He has participated in the development of the Division of Workers' Compensation Medical Treatment Guidelines. In connection with the IME Dr. Goldman took a history from the claimant, performed a physical examination and reviewed certain medical records. However, in his report Dr. Goldman noted that he received "minimal pre-existing medical records" and that "many pre-existing and co-existing records were not reviewed" prior to the IME.

23. In his report Dr. Goldman noted the claimant gave a history that his job involved lifting up to 85 pounds 4 times per day and lifting 30 t0 50 pounds 1 to 2 dozen times per day. The claimant reported that on September 2, 2013 he was working "on stilts" in a parking garage and was required to lift up to 85 pound bundles of tile. Further the claimant was awaiting right shoulder surgery and was "modifying his activity in some ways" due to shoulder pain. The claimant reported that part way through his working day he "felt weird" and experienced tingling in the right leg. Dr. Goldman stated the claimant was "very specific in noting that he did not experience any specific back pain until after his surgery." The claimant denied a prior history of lower extremity injury or treatment and denied any prior low back pain and treatment. The only exceptions were that the claimant reported 2 back strains in the 1980's and some osteopathic treatments over the past 5 years that were rendered by Dr. Jolly to alleviate "back discomfort."

24. In his report Dr. Goldman assessed "Lumbosacral spondylosis pre-existing and aggravated by September 12, 2013 [sic] work related injury resulting in right L4-5 herniated nucleus pulposus confirmed on right L4-5 laminectomy operative report." He further assessed mild residual right L5 radiculopathy and chronic lumbosacral strain in conjunction with the September 2, 2013 occupational exposure or work related injury.

25. In his report Dr. Goldman noted that based on the claimant's MRI scan he did have some "predisposition to lumbosacral strain or degenerative disk disease" (DDD). However Dr. Goldman opined this was not symptomatic to a degree that required a vocational disability assessment. He further noted that based on the history provided by the claimant and review of the available records there was "nothing to indicate much in the way of significant low back pain." Dr. Goldman opined that the L4-5 disk herniation and right lower extremity symptoms "are more likely than not primarily due to occupational exposure occurring on or around September 2, 2013." He explained that based on the records he reviewed and the claimant's history his "essential job duties particularly on the day that his low back pain was most prospectively documented probably meet criteria for potential occupational exposure." Dr. Goldman stated the claimant was "doing medium/heavy work in an awkward posture for at least a third of the day." Also, the fact the claimant was recovering from a shoulder injury would "probably force him to stabilize asymmetrical through his core musculature further putting him at risk for a strain pattern that could decompensate and result in transmission of ground reactive forces through the disk and hence the herniation is documented." Dr. Goldman further stated the fact that the work site was hard and uneven would create "even more difficult challenges to core strength and

endurance that would predispose to a strain and in light of this underlying lumbosacral degenerative disk disease, a herniation as documented."

26. On October 10, 2014 Dr. Fall issued a "Supplemental Record Review and Report." Dr. Fall indicated she had reviewed Dr. Cho's September 24, 2013 neurological evaluation in which he noted a "history of insidious onset of numbness in the right side of the body with weakness in the right leg." Dr. Fall opined that an "insidious onset would essentially mean of unknown etiology and, therefore would not be work related."

27. In the October 10, 2014 report Dr. Fall also noted that she had reviewed Dr. Goldman's IME report. Dr. Fall stated that based upon the "Level II re-accreditation course where Dr. Mueller in the past has lectured on causation analysis," the available literature would not support that "repetitive activity including lifting up to a certain level causes degenerative changes in the lumbar spine." Dr. Fall further wrote that Dr. Mueller opined that "possibly repetitive lifting over 60 pounds could be considered an occupational exposure to the lumbar spine." However, Dr. Fall stated that Dr. Goldman's own history did not support the conclusion that the claimant's job exposed him to repetitive lifting over 60 pounds. Dr. Fall further opined that the duties described to Dr. Goldman, including "trying to heal from a shoulder injury," would not be considered to cause lumbar degeneration.

28. Dr. Goldman testified at the hearing. Dr. Goldman stated that his opinion "tilts" toward the view that the claimant sustained an occupational disease and that the "straw that broke the camel's back" occurred on September 2, 2013. Dr. Goldman stated that his opinion began with establishing a diagnosis. He opined and that Dr. Cho's operative report clearly establishes the diagnosis of a herniated nucleus pulposus (HNP) with nerve root impingement. Dr. Goldman stated the claimant had some pre-existing DDD but stated the history concerning the onset of the claimant's symptoms and the clinical picture was consistent with an HNP occurring on September 2, 2013. Dr. Goldman next considered whether the circumstances of the claimant's job could have caused or aggravated the HNP. In this regard Dr. Goldman agreed with Dr. Fall that there is very little research on the subject of lifting as a cause or aggravating factor for DDD. He explained most of the research focuses on upper extremity conditions. Dr. Goldman opined that it is more than 50% probable that the claimant's duties caused the HNP and associated back strain. He explained that the claimant was required to lift 30 to 50 pounds overhead while his right arm was disabled and while he was working on stilts on an uneven surface. Dr. Goldman opined that this combination of "ergonomic" factors caused an "asymmetrical challenge" to the claimant's core strength. He opined that this challenge to core strength either caused or contributed to the disc herniation and that the herniation would not have occurred when it did but for the claimant's employment. Dr. Goldman also testified his opinion is supported by the temporal relationship between the appearance of the claimant's symptoms and his work on September 2, 2013, the relief of lower extremity symptoms resulting from surgery and the lack of any preexisting "apportionable conditions."

29. Dr. Goldman stated he did not have any of the claimant's medical records prior to September 2013. He further stated he relied on the history provided by the claimant in arriving at his opinions.

30. Dr. Fall testified at the hearing. Dr. Fall opined that the claimant sustained a disc herniation at L4-5. However, in her opinion this herniation was the result of the natural progression of the claimant's preexisting degenerative back disease and not the duties of his employment. Dr. Fall stated that the preexisting degenerative back disease was "significant" as shown by the September 2013 MRI and the x-rays performed in November 2013. Dr. Fall testified that it is not uncommon for people to have herniated disks that are asymptomatic for a long time, and then, without accompanying trauma, the herniation becomes symptomatic. Dr. Fall stated that in her opinion the herniated disc existed before September 2, 2013. She further opined that if the claimant sustained the herniation while working on September 2, 2013 she would have expected the onset of immediate back pain because an acute herniation is like a "rubber band snapping." However, the claimant did not report experiencing back pain on September 2, 2013, he reported only right lower extremity tingling. In Dr. Fall's opinion this pattern of symptoms is most consistent with the natural progression of the preexisting disc herniation which caused chemical or mechanical inflammation of the nerve.

31. Dr. Goldman testified in rebuttal. Dr. Goldman stated that it often takes a couple of days for symptoms to build up after a disc herniation and that this is a classical pattern for older patients. He believed the claimant's history was consistent with a disc herniation occurring on September 2, 2013 and the gradual buildup of symptoms resulting in the claimant's presentation at the emergency room on September 5, 2013.

32. The claimant testified in rebuttal that the bundles of tile weighed 69.8 pounds. The claimant stated that he ascertained this information by having Home Depot contact the supplier. The supplier then reviewed a Materials Safety Data Sheet establishing the weight of the tiles.

33. Medical records establish that on October 20, 2009 the claimant completed a questionnaire in which he reported experiencing low back pain as well as neck and upper extremity symptoms. On June 23, 2010, while the claimant was being treated for his motorcycle accident he reported he was experiencing daily pain "in the inner thighs" and low back.

34. The claimant failed to prove it is more probably true than not that he sustained an injury or occupational disease proximately caused, intensified or aggravated by the performance of service arising out of and in the course of his employment.

35. The claimant's testimony that he began to experience right lower tingling in his right lower extremity while at work on September 2, 2013 is not credible and persuasive. The claimant's testimony that these symptoms began on the morning of

September 2, 2013 while he was installing ceiling tiles does not appear in the history which he provided to the Swedish Medical Center emergency room on September 5, 2013. The Swedish records indicate that the claimant gave a history that he experienced the abrupt onset of weakness in his right arm and leg at 4:00 p.m. the day before yesterday (or September 3, 2013). The claimant's testimony is also inconsistent with the history he reported to Dr. Koftan on September 5, 2013. Dr. Koftan noted a history of the onset of symptoms on September 4, 2013 at 12:00 noon. There is no mention of symptoms appearing at work on the morning of September 2, 2013. The claimant's testimony is also inconsistent with the history reported to Dr. Jolly on September 10, 2013. Dr. Jolly noted the sudden onset of symptoms of right foot and arm weakness that had lasted 4 to 6 days. Dr. Jolly's records do not indicate these symptoms developed while the claimant was at work. Moreover, if the symptoms had lasted 6 days they would have commenced on September 4 as the claimant reported to Dr. Koftan, not on September 2, 2013 while he was working. The claimant's testimony is also inconsistent with the history he reported to Dr. Cho on October 1, 2013. Dr. Cho noted the claimant gave a history that on September 5, 2013 he experienced the "sudden onset" of right-sided body numbness and right lower extremity weakness. Dr. Cho's note does not contain any history that these symptoms appeared while the claimant was working on September 2, 2013.

36. The claimant's testimony that his right lower extremity weakness commenced while he was at work on September 2, 2013 is also contradicted by Mr. Schell. Mr. Schell credibly testified the claimant never told him his back condition was work related. Schell credibly testified that on October 3, 2013 the claimant said he was going to have back surgery under the employer's health insurance plan. Mr. Schell's testimony is corroborated by Dr. Kohake's October 2, 2013 notation that the claimant reported he was to undergo "nonwork-related lumbar spine surgery" on October 4, 2013. This evidence persuasively establishes that as late as October 2, 2013 the claimant had not yet reported a work related back or lower extremity injury to the employer or to his medical providers. For much the same reasons the claimant's testimony that he reported a work related injury to Elena Schell is not credible.

37. Dr. Goldman's opinion that the claimant's herniated disc and lumbar sprain probably resulted from an injury or more probably an occupational disease is not persuasive. Dr. Goldman's opinion is that although the claimant had preexisting DDD, that condition was aggravated by a September 2, 2013 exposure to a combination of overhead lifting and ergonomic factors that placed stress on the claimant's "core" and caused a lumbar strain and disc herniation. Dr. Goldman further opined that the subsequent evolution of the claimant's symptoms was consistent with a disk herniation occurring on September 2, 2013. However, Dr. Goldman's opinion is significantly based on the claimant's history that his symptoms of right lower extremity numbness developed on September 2 while he was at work lifting tiles overhead while on stilts, standing on an uneven work surface while protecting his right arm. (Findings of Fact 23, 25, 28). As found, the claimant's testimony that he developed symptoms at work on September 2 is not credible. It follows that the history the claimant gave to Dr. Goldman concerning the development of his symptoms is not credible. It also follows that Dr. Goldman's opinion concerning the causal relationship between the ergonomic

conditions of the claimant's employment and the development of his back condition is founded on an inaccurate understanding of the temporal relationship between the symptoms and the exposure to the alleged ergonomic hazards of employment.

38. Dr. Fall credibly and persuasively opined that the claimant's herniated disc and related symptoms are the result of the claimant's preexisting DDD. Dr. Fall's opinion that the claimant had preexisting DDD is corroborated by the September 2013 MRI which showed "degenerative changes at the L4-5 lumbar regions" and the November 2013 lumbar x-rays showing pronounced degenerative disc disease at L4-5. Dr. Goldman agreed that there was preexisting DDD. Dr. Fall credibly opined that it is common for DDD to result in a disc herniation that is unrelated to any trauma. Dr. Fall credibly opined that if the claimant has suffered an acute herniation on September 2, 2013 it is probable that he would have experienced immediate back pain, but the claimant reported that his only symptoms on September 2 were "feeling weird" and numbness in the right lower extremity. Dr. Fall's opinion is all the more persuasive since the ALJ finds the claimant's testimony that he experienced right lower extremity symptoms while at work on September 2 is not credible. As found, the claimant's testimony that his symptoms began at work is inconsistent with his reported history contained in the medical records from September and October 2013 as well as his statements to Mr. Schell and Dr. Kohake. Dr. Fall persuasively noted this inconsistency in her April 2014 report where she observed that the "initial medical records" did not document any report of an alleged work related injury.

39. Dr. Fall credibly opined that the claimant did not describe any "traumatic event" on September 2, 2013 that would explain the development of a herniated disc. Dr. Goldman apparently agrees with Dr. Fall in this regard since he stated that he "tilts" toward a belief that the claimant sustained an occupational disease resulting from the exposure to ergonomic factors and repetitive lifting. Based on this evidence the ALJ finds the claimant did not sustain any occupational "injury" that is traceable to a particular time place and cause.

40. Evidence and inferences inconsistent with these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation

case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY OF ALLEGED INJURY OR OCCUPATIONAL DISEASE

The claimant alleges that he sustained an injury or occupational disease as a result of performing his duties that entitles him to an award of temporary total disability benefits and compensation for the medical treatment provided by Swedish Hospital, Dr. Jolly, and Dr. Cho. Relying principally on his own testimony and the opinions of Dr. Goldman, the claimant argues that a preponderance of the evidence establishes that on September 2, 2013 he sustained an injury or "occupational exposure" that caused him to experience a herniated disc and back strain. The ALJ disagrees with this contention.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof to establish causation is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards

associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.*

As determined in Findings of Fact 34 and 39, the claimant failed to prove that he sustained any work related "injury" arising out of and in the course of his employment. The ALJ credits the opinion of Dr. Fall that the claimant did not describe any traumatic event on September 2, 2013 that could explain the occurrence of a herniated disc. Indeed, even Dr. Goldman explained that he "tilts" toward the belief the claimant's condition is the result of an occupational disease rather than a traumatic injury. It follows that the claimant did not experience any "injury" that is traceable to a specific time place and cause.

As determined in Findings of Fact 34 through 38, the claimant failed to prove that he sustained an occupational disease of the low back that was proximately caused, intensified or aggravated by the performance of service arising out of and in the course of his employment. As found, the claimant's testimony that he experienced symptoms of right lower extremity numbness while performing his duties on September 2, 2013 is not credible and persuasive. That testimony is inconsistent with the history recorded in the contemporaneous medical records and is inconsistent with statements the claimant made to Mr. Schell and Dr. Kohake. Further, Dr. Fall's opinion that the disc herniation and related symptoms resulted from the natural progression of the preexisting DDD is more credible and persuasive that Dr. Goldman's opinion. As found, Dr. Goldman's opinion is to a large extent based on the assumption that the claimant gave an accurate history that his symptoms began on September 2, 2013 while he was exposed to "ergonomic" factors that placed stress on the disc. However, the ALJ has discredited that history. Moreover, Dr. Fall credibly and persuasively opined that the onset of the claimant's symptoms is consistent with the natural progression of the preexisting DDD.

It follows that the claim for workers' compensation benefits must be denied. The ALJ need not address the parties' other arguments.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-917-643 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 28, 2015

DIGITAL SIGNATURE:

David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUE

The issue whether Claimant's injury occurred within the course and scope of his employment was raised for consideration at hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 22 year old former employee of Employer who worked for respondent employer from January 3, 2014, through January 8, 2014. The job for which Claimant was hired to work consisted of building a pipeline that started in Stratton, Colorado and stretched southeast to Dighton, Kansas. The jobsite was essentially a "moving jobsite" in that work progressed at the rate of approximately two miles per day and the jobsite was not located in the exact same location each day. Claimant worked on the same pipeline for each of his six days of employment with Employer.

2. A truck allowance is extended to employees of Employer at the time of hire for use of their vehicles in transporting workers and supplies to the job site.

3. On January 9, 2014 Claimant was injured while driving to work after returning from a trip to the airport. Claimant had requested the morning off of work in order to take his fiancée to the airport and the trip to and from the airport was in no way related to his work for Employer.

4. At the time of his accident, Claimant was driving a truck owned by his fiancée, Rachel Cooper, who was a former employee for Employer.

5. Although Ms. Cooper applied for and requested that her vehicle be placed on Employer's payroll, neither Ms. Cooper nor Claimant received any truck pay for the vehicle because Employer never received the necessary insurance documents for the vehicle and never authorized use of the vehicle for transporting supplies and employees to the job site.

6. Dwight Brasseaux testified on behalf of Respondents. Mr. Brasseaux was the project superintendent for the job at which Claimant was working. He testified that he was the only person on the project with authority to approve work-related travel. He further stated that any time off for workers on the project should have been cleared with him because he needed to know where each of his workers

was during the work day. Mr. Brasseaux did not authorize Claimant to take his fiancé to the airport and did not authorize Claimant to be paid for that time. Mr. Brasseaux testified that the normal reporting time in the morning was 7:00 a.m. and that no employees were paid for travel to and from work. The only "travel" for which employees were paid was for travel from the warehouse to the jobsite. No employees were considered "on the clock" until they arrived at the warehouse/office or on the actual jobsite.

7. Mr. Brasseaux also testified that only vehicles that have been extended the truck allowance were authorized to be on the jobsite and any other vehicles on the jobsite were considered unauthorized.

8. According to Mr. Brasseaux, Ms. Cooper's vehicle was never extended the truck allowance because Employer never received the necessary insurance documents for Ms. Cooper's vehicle in order to properly extend the vehicle the allowance. Mr. Brasseaux also stated that even if Ms. Cooper had been extended the allowance, once Ms. Cooper's employment terminated, the allowance would have terminated.

9. Claimant testified that his immediate supervisor, Terry Cooper, had given him the morning off to take his fiancée, Mr. Cooper's daughter, to the airport. Claimant said that Mr. Cooper advised him to report to work after the trip. Claimant also testified that he called Mr. Cooper at approximately noon to get instructions on where to report to work and Mr. Cooper gave him the precise location to which he was to report. Claimant testified that his accident occurred on the road leading to the jobsite and that he was never able to locate the precise location to which he had been directed by Mr. Cooper.

10. Claimant also testified that although he never received the truck allowance, it was his understanding that Ms. Cooper's truck was nevertheless on payroll and he used the vehicle on the premises for work purposes.

11. Terry Cooper offered rebuttal testimony on behalf of Claimant. Like Claimant he testified that Claimant called him at approximately noon on January 9, 2014, and that he directed Claimant to a specific location for work and at that point considered Claimant to be working. Mr. Cooper testified he believed this was appropriate because it was consistent with how a workday normally started. According to Mr. Cooper, the crew was considered to be on the clock at 7:00 a.m. after they filled up their trucks at the designated fueling station and received their job assignments for the day. Hence, in Mr. Cooper's opinion, once he told Claimant his assignment for the day and Claimant was on his way to that assignment, Claimant was "on the clock" regardless of Claimant's physical location at the time.

12. Mr. Cooper also testified that he placed Ms. Cooper's truck on payroll and that it was in fact on payroll. Contrary to Mr. Brasseaux's testimony, Mr. Cooper stated

the necessary paperwork had been turned in and simply had not been processed. In fact, Mr. Cooper testified that he was aware that it could sometimes take up to a month for the paperwork on a truck to be properly processed and stated that he "needed that truck" and routinely made use of vehicles while awaiting approval from Employer.

13. Stephen Hamby provided a written statement regarding the January 9, 2014, incident. Mr. Hamby wrote that on January 9, 2014, Claimant did not show up for work. Mr. Cooper told Mr. Hamby that Claimant was expected at noon. According to Mr. Hamby at noon, Mr. Cooper called Mr. Hamby and said he had not heard from Claimant all day and could not reach Claimant. At about 3:00 p.m., Mr. Cooper received a call stating that Claimant had been in an accident and at that time Mr. Cooper told Mr. Hamby to put Claimant on the time sheet and pay him for 5 hours of work and that Mr. Brasseaux had approved it. Mr. Hamby was subsequently told to remove Claimant's name from the timesheet because Claimant had never been at work. At hearing, Mr. Cooper admitted to telling Mr. Hamby to put Claimant down for 5 hours of work but was never able to offer any explanation for how he had come up with 5 hours.

14. The testimony of Mr. Brasseaux is more credible and persuasive than that of Claimant and Mr. Cooper. The ALJ finds that the testimony of Claimant and Mr. Cooper was biased and reflected their personal interest in having the claim deemed compensable.

15. It is found that at the time of Claimant's accident Claimant was not performing any work-related function or traveling in a company vehicle at the time of his accident, and conferred no benefit on Employer beyond Claimant's arrival at work. Rather, Claimant was simply returning from a personal errand, traveling in a private vehicle while on his way to work when the accident occurred. Hence, Claimant has failed to carry his burden of proving that he was in the course and scope of his employment at the time of his accident.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers'

compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*. A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

2. In this case, the issue whether Claimant sustained his burden of proof rest upon credibility determinations regarding Claimant and his witness's testimony. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). As found, the testimony of Mr. Brasseaux was more credible than the testimony of Claimant and Mr. Cooper.

3. Travel to and from work that confers no benefit upon the employer beyond the sole fact of the employee's arrival at work, is not travel that occurs within the course and scope of employment and injuries that occur during such travel are not compensable. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). Exceptions to this rule include travel at the express or implied request of the employer, *Berry's Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2 (1967), or when the travel confers a benefit on the employer beyond the mere fact of the employee's arrival at work. *Shandy v. Lunceford*, 886 P.2d 319 (Colo.App.1994). As found here, Claimant's travel to the jobsite conferred no benefit on Employer beyond Claimant's arrival at the jobsite. The testimony of Claimant and Mr. Cooper that Claimant may have been given any specific travel directions by Mr. Cooper was not credible.

4. Claimant has failed to carry his burden of proving that he was within the course and scope of his employment at the time of his accident. As a result, the claim is not found to be compensable.

ORDER

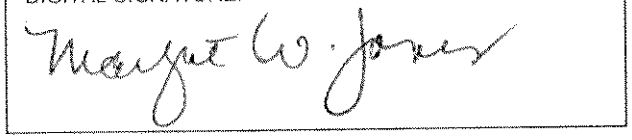
It is therefore ordered that:

Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 26, 2015

DIGITAL SIGNATURE:



Margot W. Jones
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-944-662-02

ISSUE

Whether Claimant sustained a compensable on-the-job injury while working for Employer.

PRELIMINARY MATTERS AND HEARING ISSUES

Claimant endorsed a number of hearing issues on the application for hearing including compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, temporary total disability benefits (from September 26, 2013 through a date to be determined), temporary partial disability benefits (from September 26, 2013 through a date to be determined), penalties (for Employer allegedly failing to acknowledge Claimant's claim when he first filed it), benefits, and termination.

Respondents endorsed compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, temporary total disability benefits (from September 26, 2013 through a date to be determined), temporary partial disability benefits (from September 26, 2013 through a date to be determined), failure to plead penalties with specificity under § 8-43-304(4), C.R.S., causation, relatedness of medical benefits, preexisting condition, intervening cause or event, safety rule violation pursuant to § 8-42-112(1)(b), C.R.S., voluntary termination of employment, responsibility for termination pursuant to §§ 8-42-103(1)(g) and 8-42-105(4)(a), alternative compensation including FMLA leave and STD/LTD benefits, and offsets.

Claimant initially filed two claims for compensation that generated two workers' compensation numbers, case number 4-944-662-02, which was Claimant's claim for back, shoulder, hands, and arm injuries due to alleged lifting injuries, and case number 4-944-671, which was for occupational disease stemming from Claimant's alleged exposure to radioactive materials. On May 13, 2014, these two claims were consolidated pursuant to WCRP 9-6 after a prehearing conference held on May 9, 2014 before prehearing ALJ Thomas DeMarino.

At the beginning of hearing, Claimant renewed a motion to continue the hearing that he had filed on October 9, 2014. The ALJ denied the motion pursuant to § 8-43-207, C.R.S.

FINDINGS OF FACT

Background

1. Claimant's physical complaints, injuries, and conditions that he attributes to his work for Employer due to lifting include back, shoulder, and arm pain, hand numbness, rotator cuff damage, muscle spasms on the left side of his back, and pain across his back. Claimant stated that he suffers from diverticulitis, an injury to his left

knee, rectal bleeding, body hives and/or cysts, and general malaise, which he believes were caused or exacerbated by his work for Employer.

2. Claimant also alleged injuries and conditions, including anxiety and depression, due to his exposure to radioactive material at Employer's workplace.

Claimant's Employment with Employer – Lifting

3. Employer hired Claimant on October 17, 2005 to work as a mechanical seal repair technician. In this position, Claimant dismantled, washed, polished, and refurbished seals that had been used in industrial pumps of various sizes. These seals were used in pumps primarily in the oil and gas industry, and also in the space industry.

4. Claimant performed approximately 90% of the cleaning, polishing, and refurbishing of the seals for Employer.

5. Claimant's job duties included tasks such as adjusting a "cheater bar" up to 20 times per day.

6. Another task was hand "lapping." Claimant performed about 90% of the lapping work for Employer. Claimant normally used a lapping machine, but at times he performed hand lapping. The lapping machine was between waist and chest high, and several times per year, Claimant "lapped" for two or three days in a row.

7. There was conflicting evidence about the weight of the seals Claimant had to lift. Claimant claimed he had to lift seals that weighed up to 120 pounds, while other evidence suggested that the heaviest seals he had to lift weighed 50 pounds. It is found as fact that the heaviest seals that Employer received weighed 120 pounds, which were the "Flexbox" seals. It is found as fact that the heaviest seals Claimant had to lift weighed 75 pounds.

8. Claimant would have to lift seals to approximately chest height in order to place them on an ultrasonic cleanser as part of his job. Claimant had to hold his arms chest-high when using this machine. Claimant was the employee who primarily performed this task.

9. The typical weight of seals Claimant worked on was between five and 30 pounds. Two to three times per week he would have to work on seals that weighed more than 30 pounds.

10. Employer had an engine hoist and carts available for its employees to use to lift heavy objects. The engine hoist and carts were available to Claimant for his use.

11. Employees wore gloves, safety glasses, and work boots when working on the seals.

Claimant's Employment with Employer – Alleged Exposure to Unacceptable Levels of Radiation

12. In the summer of 2013, one of Employer's customers, Sulzer, hired Employer to clean and refurbish seals that contained "naturally occurring radioactive material," known as "NORM."

13. Neither Colorado nor the federal government have established regulations concerning safe levels of NORM exposure. Companies must determine best practices for safe NORM levels.

14. Sulzer established 1000 parts per milligram ("ppm") as its acceptable NORM level.

15. In or around July of 2013, Employer received two sets of ten seals from Sulzer. The seals were delivered by regular UPS and not by any kind of hazardous materials delivery service.

16. Claimant opened one set of the Sulzer seals in July of 2013, and cleaned two of the seals.

17. Claimant wore gloves and a respirator when he cleaned the two Sulzer seals.

18. Sulzer hired Mr. Richard Block, an expert in workplace environmental studies, to test their seals for radiation levels. Mr. Block is an expert in acceptable levels of NORM, as well as levels of "technically enhanced naturally occurring radioactive material," known as "TENORM."

19. Mr. Block credibly testified, and it is found as fact, that NORM and TENORM are not considered hazardous materials, but that they need to be monitored to ensure they remain at acceptable levels.

20. Mr. Block credibly testified, and it is found as fact, that 1000 ppm is an acceptable NORM level, that it is no higher than people are exposed to in their everyday lives, and that 1000 ppm is a reasonable standard.

21. Employer also hired Mr. Block to inspect and measure the NORM levels at Employer's workplace. Mr. Block explained NORM and TENORM to Employer's employees, and instructed them on the use of Geiger counters to monitor NORM and TENORM levels.

22. Mr. Block inspected and measured the NORM and TENORM levels at Claimant's worksite and found that the levels were acceptable.

23. Mr. Block personally tested the Sulzer seals that are in question in this hearing. He credibly testified, and it is found as fact, that Claimant was completely safe

when he cleaned the two Sulzer seals and that there was no TENORM present in any of the Sulzer seals that Claimant was near.

24. Mr. Block further credibly testified, and it is found as fact, that Claimant breathed in less NORM at Employer's worksite than he did when he was outdoors or at his home.

25. Claimant filed complaints about Employer with OSHA and with the Colorado Department of public Health and Environment ("CDPHE").

26. OSHA conducted an onsite inspection of Employer, interviewed some of Employer's employees, and used a Geiger counter to check for radiation.

27. OSHA did not find any violations on the part of Employer and indicated it would not be conducting any additional investigation.

28. Claimant appealed OSHA's decision and his appeal was denied.

29. CDPHE inspected Employer, and its finding concerning radioactive levels at Employer's worksite was "no contamination."

30. CDPHE sent a letter to Claimant stating that there was no evidence of TENORM contamination at Employer's work site.

31. Claimant did not produce any expert testimony or objective evidence that he was exposed to toxic levels of chemicals or radiation at Employer's workplace.

32. Claimant failed to prove by a preponderance of the evidence that he suffered from exposure to unacceptable levels of NORM, TENORM, or any other type of chemical or radioactive substances at Employer's worksite.

33. Claimant failed to prove by a preponderance of the evidence that any level of NORM or TENORM that he was exposed to at Employer's worksite caused any medical illnesses, conditions, or occupational diseases.

Claimant's Medical and Psychological Conditions and Injuries

34. Dr. David Diffee is a licensed psychologist who has treated Claimant over the years, and who began treating him again on January 22, 2013.

35. Dr. Diffee was deemed an expert in psychology at hearing.

36. In Dr. Diffee's expert opinion, Claimant was depressed, anxious, upset, and confused about where he "fit in" with Employer. Claimant was also very fearful of his workplace situation, and about the fact that he believed Employer did not have his best interests at heart.

37. From January to July of 2013 Claimant saw Dr. Diffee about once per week.

38. Dr. Diffee opined that in January 2013, Claimant was very anxious about airborne particulate/material at his worksite.

39. Dr. Diffee administered the "Personality Assessment Inventory" ("PAI") to Claimant on April 7, 2014, three months prior to the Sulzer seals arriving at Claimant's worksite. Dr. Diffee explained that the PAI is the new standard for psychological testing.

40. Claimant scored high in "malingering" on the PAI.

41. Dr. Diffee testified that while he observed Claimant's emotional health deteriorate, and witnessed Claimant's anxiety and depression increase, he could not state that it was because of chemical exposure at Employer. He also testified that none of Claimant's "Axis I" diagnoses were caused by Employer.

42. Claimant testified that his physical conditions or illnesses included diverticulitis, curvature in his spine, rectal bleeding, high iron in his body, cysts on back of his ear, a baker cyst in his left knee, back, neck and arm numbness, and that his hips locked up impeding his ability to walk.

43. Claimant underwent an independent medical examination with Dr. Eric Ridings, a board certified physical medicine and rehabilitation specialist who is Level 2 accredited. Dr. Ridings examined Claimant on August 26, 2014 and September 18, 2014. He also reviewed Claimant's chiropractor's notes, and notes from a stay Claimant had at Littleton Adventist hospital.

44. Dr. Ridings was admitted as a medical expert at hearing.

45. Dr. Ridings' physical examination of Claimant revealed that Claimant did not have any injuries or medical conditions except for a thoracic kyphosis, which was unrelated to Claimant's employment with Employer.

46. Dr. Ridings credibly testified that he did not find any reason to relate Claimant's job for Employer to any of his alleged injuries or conditions to any degree of medical certainty whatsoever.

47. He further testified that any radiation Claimant was exposed to during his work for Employer did not cause or contribute to Claimant's alleged diverticulitis, knee fracture, curvature of the spine, or rectal bleeding.

48. Claimant did not produce any expert testimony or objective medical evidence that his work for Employer caused or contributed to any of his alleged medical conditions or illnesses.

49. Claimant failed to prove by a preponderance of the evidence that he suffered an injury or occupational disease as a result of lifting at Employer's work site.

50. Claimant failed to prove entitlement to temporary total or temporary partial disability benefits from September 26, 2013 forward. Claimant's alleged wage loss due to work injuries or conditions is not attributable to his work for Employer.

51. Claimant failed to prove a compensable claim or occupational disease secondary to his work for Employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S.

2. For a claim to be compensable under the Act, a claimant has the burden of proving by a preponderance of the evidence that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. § 8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006).

3. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A workers' compensation case is decided on its merits. *Id.*

4. In deciding whether a claimant has met the burden of proof, the ALJ is empowered to resolve conflicts in evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *See, Brodensleck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990).

5. The ALJ is also charged with considering an expert witness's special knowledge, training, experience, or research in a particular field. *See, Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). Finally, the ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See, e.g.* § 8-43-210, C.R.S.; *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995).

6. An ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion, and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

7. An injury occurs "in the course of" employment when the employee demonstrates that the injury occurred within the time and place of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

8. The "arising out of" element is narrower than the course of employment element, and requires a claimant to show a causal connection between the employment and the injury such that the injury had its origins in the employee's work-related functions, and is sufficiently related to those functions to be considered part of the employment contract. *Triad*; *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). It is generally sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9 (Colo. App. 1995). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact that the ALJ must determine based on a totality of the circumstances. *Moorhead Machinery & Boiler Co. v. DelValle,* 934 P.2d 861 (Colo. App. 1996).

9. Claimant has failed to prove by a preponderance of the evidence that any of his alleged injuries or conditions occurred in the course of his employment with Employer. Claimant has likewise failed to prove by a preponderance of the evidence that any of his alleged injuries arose out of his employment with Employer. Claimant did not introduce medical records, physician reports, or physician testimony establishing that he actually suffered from any of the ailments he attributed to working for Employer. This is not to say that Claimant does not suffer from these ailments – he may. However, because Claimant is not a medical doctor or medical expert, his testimony and opinions about his ailments, without corroboration by a medical doctor or by medical records, are insufficient to prove by a preponderance of the evidence that he does suffer from these conditions. Indeed, the one physician who did testify, Dr. Ridings, credibly testified that Claimant had no diagnoses except for thoracic kyphosis, which was unrelated to Claimant's employment with Employer.

10. Claimant likewise failed to introduce any evidence that his work for Employer caused or contributed to any health conditions that he attributed to exposure to toxic levels of NORM, TENORM, or any other chemical. OSHA and CDPHE investigated Employer and found no dangerous levels of NORM or TENORM or other contaminants. Mr. Block personally tested the Sulzer seals Claimant was concerned about, and did not find levels of NORM or TENORM higher than Claimant would have been exposed to outdoors or at his home. Finally, Claimant's high PAI score on malingering, while it does not prove that he is malingering, may explain to some extent why there is no objective medical evidence to support his allegations.

ORDER

It is therefore ordered that any and all of Claimant's claims for workers' compensation, and his request for penalties, are denied and dismissed. Any remaining issues are moot.

DATED: January 29, 2015.

/s/ Tanya T. Light
Tanya T. Light
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, Fourth Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that medical treatment in the form of a right total shoulder arthroplasty as recommended by Alireza T. Alijani, M.D. is reasonable, necessary and related to his February 24, 2014 industrial injury (W.C. No. 4-946-408).

2. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his January 9, 2012 Workers' Compensation claim (W.C. No. 4-888-893) based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant is a 59 year old male who works for Employer as a Driver. His job duties involve shuttling vehicles around Employer's facility. Claimant acknowledged that he has had a lengthy history of right shoulder injuries and osteoarthritis.

2. On January 9, 2012 Claimant slipped and fell onto his right side and injured his right shoulder during the course and scope of his employment with Employer. Workers' Compensation number 4-888-893 was assigned to the claim. Respondents admitted the claim and referred Claimant for medical treatment. X-rays taken on January 10, 2012 revealed severe osteoarthritis with decreased glenohumeral space and evidence of chronic calcific tendinitis in the right shoulder. Claimant underwent physical therapy and injections.

3. On March 16, 2012 Claimant visited Michael Hewitt, M.D. for a surgical consultation. Dr. Hewitt reviewed a right shoulder MRI that revealed advanced glenohumeral arthritis. In discussing treatment options, Dr. Hewitt noted that Claimant "understands surgery would require a shoulder replacement and his glenohumeral arthritis is preexisting. He states he is not interested in surgery."

4. On April 24, 2012 Claimant reached Maximum Medical Improvement (MMI). Jeffrey Wunder, M.D. assigned Claimant an 8% right upper extremity impairment rating. Claimant subsequently returned to work for Employer.

5. On July 20, 2012 Respondents filed an Amended Final Admission of Liability (FAL) acknowledging Dr. Wunder's 8% right upper extremity impairment rating. Claimant did not seek a Division Independent Medical Examination (DIME) or otherwise object to the FAL.

6. On February 24, 2014 Claimant injured his right shoulder, left shoulder, left knee and left ankle while working for Employer. The injuries occurred when a co-

worker was driving a 15 passenger van and started moving before Claimant entered the vehicle. Claimant was in the process of pulling himself into the vehicle. He explained that he had his left foot on the running board and his right foot was about 18 inches off the ground. Claimant had his left hand on the door and was holding onto seat belts with his right hand when the driver pulled away. Claimant remarked that the motion of the van caused his body to swing abruptly to the side and he was slammed into the back door of the vehicle. .

7. Claimant commented that when the accident occurred he experienced a "pop" in his right shoulder. After initially treating his shoulder with ice, Claimant reported the injury to Employer. Employer referred Claimant to HealthOne Occupational Medical Centers for medical treatment.

8. Respondents admitted the claim and Claimant visited Christian O. Updike, M.D. at HealthOne on March 4, 2014 for an evaluation. Claimant expressed concerns about possible torn tendons in his right shoulder. Dr. Updike noted that Claimant underwent a right shoulder MRI in 2012 and doctors recommended surgery. He determined that Claimant had full active range of motion and diagnosed him with a right shoulder strain that appeared to be muscular. Dr. Updike explained that "[t]his is an unusual mechanism of injury. In the absence of fall, would not meet Colorado treatment guidelines for a rotator cuff tear in my opinion."

9. On March 21, 2014 Claimant underwent a right shoulder MRI. The reading physician compared the current MRI to the 2012 MRI and found "[p]rogression of degenerative change within the glenohumeral joint with bone-on-bone and bone remodeling." The physician also noted chronic degenerative changes within the shoulder joint without evidence of an acute injury. However, there was "a small partial bursal surface rim rent like tear of the cuff" that was new from the previous MRI.

10. On March 28, 2014 Claimant visited Robert White, M.D. for an examination. Dr. White reviewed Claimant's right shoulder MRI report and noted that there were no acute findings. He determined that Claimant suffered from "[c]hronic right shoulder pain. Right shoulder with simply progression of degenerative change with bone-on-bone disease."

11. On April 2, 2014 Claimant visited orthopedist Herbert J. Thomas, III, M.D. Dr. Thomas described the injury to the right shoulder as apparently caused by an abduction and flexion stress. Claimant had pain in the right shoulder area as well as swelling over the anterior and lateral chest region. He described his pain as constant, worsened by moving around and interfering with normal functions. Dr. Thomas noted that Claimant underwent approximately five sessions of physical therapy that did not seem to make any significant change in his symptoms and was subsequently discontinued. Dr. Thomas found that Claimant's range of motion was laterally restricted and he had a positive impingement sign. He also noted crepitus with motion against resistance. Dr. Thomas diagnosed a right shoulder muscle strain with severe degenerative changes. He stated that Claimant might be a candidate for total right shoulder arthroplasty if his symptoms persisted.

12. On April 17, 2014 Claimant visited Mark Failinger, M.D. for an examination. Dr. Failinger noted that Claimant had a significant history of right shoulder problems including arthritis and a recommendation for a total shoulder replacement. Claimant advised Dr. Failinger that he "had bone-on-bone for a long period of time, but [Claimant] thinks the collar bone is the biggest problem." Dr. Failinger diagnosed Claimant with "[r]ight shoulder beyond severe degenerative joint disease" and stated "[t]here is really nothing for the right shoulder other than maybe to live with it or get a shoulder replacement which they tried to convince him to do years ago but he said he did not want to do it because they were going to take down some muscles, so he declined."

13. On April 28, 2014 Claimant underwent an MRI of his clavicle. The imaging revealed degenerative changes in the glenohumeral, sternoclaviclular, and acromioclavicular joints.

14. On May 23, 2014 Claimant was evaluated by orthopedist Alireza T. Alijani, M.D. Dr. Alijani reported that Claimant was suffering pain and discomfort in the right shoulder area. Upon physical examination, Dr. Alijani noted that Claimant had range of motion deficits and crepitus. He diagnosed Claimant with right shoulder osteoarthritis. Dr. Alijani did not make any record of Claimant's mechanism of injury or determine whether his current complaints were related to the February 24, 2014 industrial incident. Dr. Alijani recommended a right shoulder arthroplasty and sought prior authorization from Insurer. Insurer denied the request.

15. On October 8, 2014 Dr. Alijani wrote to Claimant's counsel. He stated that Claimant's current condition is consistent with the diagnosis of right shoulder osteoarthritis. He noted that Claimant's degenerative condition is at an endstage with complete loss of cartilage surface. Dr. Alijani explained that "[i]n terms of his condition being caused by the accident, it is very difficult to say with any medical probability, but, I would say certainly that if he did not have the symptoms in the shoulder prior to the incident and developed them afterwards that, with a high degree of medical probability, the work-related circumstance exacerbated his underlying condition."

16. On August 21, 2014 Claimant underwent an independent medical examination with Neil L. Pitzer, M.D. On November 6, 2014 Dr. Pitzer testified through an evidentiary deposition this matter. After reviewing medical records and performing a physical examination, he concluded that Claimant's right shoulder condition constituted the natural progression of his underlying degenerative osteoarthritis. Dr. Pitzer explained that the force on Claimant's right shoulder during the February 24, 2014 incident was insufficient to cause ligamentous tearing, disruption of the cartilage in the shoulder joint or aggravation of an underlying condition. After reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the progression of Claimant's underlying degenerative osteoarthritis.

17. Dr. Pitzer also explained that Claimant's need for right shoulder replacement surgery was entirely due to his pre-existing and severe degenerative

osteoarthritis and not the result of the February 24, 2014 incident. In his deposition Dr. Pitzer testified that Claimant's described mechanism of injury would not have caused an aggravation of his underlying osteoarthritis and that any pain symptoms Claimant experienced were due to the inevitable progression of severe degenerative osteoarthritis. Ultimately, Dr. Pitzer summarized that Claimant would have required a right shoulder replacement regardless of the February 24, 2014 accident.

18. Claimant testified at the hearing in this matter. He explained that from the time he was discharged at MMI for his January 9, 2012 injury until the present injury on February 24, 2014 he had no problems with his right arm aside from some therapy in approximately August 2012 after he pulled his shoulder while lifting a bucket at work. Claimant remarked that he had no functional limitations, could lift weights and was able to drive with his right arm. He commented that he did not have pain in his right shoulder.

19. Claimant's testimony is contravened by the medical records and opinions of his previous treating physicians. His long history of osteoarthritis is extensively documented in the medical records. Claimant's osteoarthritis was severe and degenerative enough to warrant a recommendation for a total right shoulder replacement in 2012. Further, Dr. Wunder expressed doubt in 2012 that Claimant's shoulder was asymptomatic prior to the January 9, 2012 injury because of the advanced state of his osteoarthritis.

20. Claimant has failed to demonstrate that it is more probably true than not that medical treatment in the form of a right total shoulder arthroplasty as recommended by Dr. Alijani is reasonable, necessary and related to his February 24, 2014 industrial injury. The medical records reflect that Claimant has severe, pre-existing, degenerative osteoarthritis in his right shoulder. A February 4, 2012 right shoulder MRI revealed advanced right shoulder degenerative osteoarthritis. Claimant's condition was severe and degenerative enough to warrant a recommendation for a total right shoulder replacement in 2012. Moreover, Dr. Pitzer persuasively explained that Claimant's right shoulder condition constituted the natural progression of his underlying degenerative osteoarthritis. Dr. Pitzer noted that the force on Claimant's right shoulder during the February 24, 2014 incident was insufficient to cause ligamentous tearing, disruption of the cartilage in the shoulder joint or aggravation of an underlying condition. After reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the natural progression of Claimant's underlying degenerative osteoarthritis. Dr. Pitzer also explained that Claimant's need for right shoulder replacement surgery was entirely due to his pre-existing and severe degenerative osteoarthritis and not the result of the February 24, 2014 incident. Finally, Dr. Alijani explicitly stated that Claimant's need for shoulder surgery was solely related to his underlying osteoarthritis. There is almost no mention of Claimant's injury in Dr. Alijani's reports and he did not perform a causation analysis. Instead, Dr. Alijani simply stated that it is possible that the accident may have temporarily exacerbated Claimant's underlying osteoarthritis. Accordingly, Claimant's request for total right shoulder replacement surgery is denied.

21. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his January 9, 2012 Workers' Compensation claim in W.C. No. 4-888-893 based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant's right shoulder condition was so severe that Dr. Hewitt recommended a total right shoulder replacement in 2012. Dr. Hewitt noted that Claimant's need for right shoulder surgery was not caused by the 2012 injury but rather his advanced osteoarthritis. Moreover, after reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the progression of Claimant's underlying, degenerative osteoarthritis. Any deterioration in Claimant's right shoulder condition constitutes the natural progression of his degenerative condition and is not causally related to his January 9, 2012 industrial injury. Accordingly, Claimant's request to reopen W.C. No. 4-888-893 is denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Treatment

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the

employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that medical treatment in the form of a right total shoulder arthroplasty as recommended by Dr. Alijani is reasonable, necessary and related to his February 24, 2014 industrial injury. The medical records reflect that Claimant has severe, pre-existing, degenerative osteoarthritis in his right shoulder. A February 4, 2012 right shoulder MRI revealed advanced right shoulder degenerative osteoarthritis. Claimant's condition was severe and degenerative enough to warrant a recommendation for a total right shoulder replacement in 2012. Moreover, Dr. Pitzer persuasively explained that Claimant's right shoulder condition constituted the natural progression of his underlying degenerative osteoarthritis. Dr. Pitzer noted that the force on Claimant's right shoulder during the February 24, 2014 incident was insufficient to cause ligamentous tearing, disruption of the cartilage in the shoulder joint or aggravation of an underlying condition. After reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the natural progression of Claimant's underlying degenerative osteoarthritis. Dr. Pitzer also explained that Claimant's need for right shoulder replacement surgery was entirely due to his pre-existing and severe degenerative osteoarthritis and not the result of the February 24, 2014 incident. Finally, Dr. Alijani explicitly stated that Claimant's need for shoulder surgery was solely related to his underlying osteoarthritis. There is almost no mention of Claimant's injury in Dr. Alijani's reports and he did not perform a causation analysis. Instead, Dr. Alijani simply stated that it is possible that the accident may have temporarily exacerbated Claimant's underlying osteoarthritis. Accordingly, Claimant's request for total right shoulder replacement surgery is denied.

Reopening

6. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving her condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

7. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his January 9, 2012 Workers' Compensation claim in W.C. No. 4-888-893 based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant's right shoulder condition was so severe that Dr. Hewitt recommended a total right shoulder replacement in 2012. Dr. Hewitt noted that Claimant's need for right shoulder surgery was not caused by the 2012 injury but rather his advanced osteoarthritis. Moreover, after reviewing Claimant's right shoulder MRI's taken on February 4, 2012 and March 21, 2014, Dr. Pitzer determined that there were no acute right shoulder changes and any differences were attributable to the progression of Claimant's underlying, degenerative osteoarthritis. Any deterioration in Claimant's right shoulder condition constitutes the natural progression of his degenerative condition and is not causally related to his January 9, 2012 industrial injury. Accordingly, Claimant's request to reopen W.C. No. 4-888-893 is denied.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for authorization for his total right shoulder arthroplasty is denied and dismissed.

2. Claimant's request to reopen W.C. No. 4-888-893 is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 9, 2015.

DIGITAL SIGNATURE:

_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issues to be determined are whether the Claimant sustained an injury to her left shoulder and arm in the course and scope of her employment with the Employer.

FINDINGS OF FACT

Based on the evidence presented during the hearing, the Judge finds as fact:

1. The Claimant worked for the Employer as a lobby attendant.

2. The Claimant alleges she suffered an injury to her left shoulder and left arm on February 17, 2014.

3. On February 17, 2014, Claimant filled out and signed an Employee Injury Report and Statement, stating that the injury occurred "walking to spa" and that "out of nowhere I got this pain on my side."

4. The Claimant also completed a written statement. The Claimant wrote, "I opened the door, started walking to the spa to take towels & I felt shortness of breathe [sic] & I got a weird pain on my side & it started to shoot up to my shoulder."

5. The Claimant completed the Employee Injury Report and Statement within a short period of time after she believed she sustained an injury. The Claimant did not attribute her sudden onset of pain to opening heavy doors while working.

6. Claimant testified that she notified Dora the supervisor of her pain on the day of the accident, and Dora filled out an accident form. Dora stated that "[Claimant] was seen by Todd, the laundry manager, holding her rib and bending over," and that "she states she feels a sudden sharp pain on her left side." Dora did not mention anything about Claimant's shoulder. Dora stated in response to the question asking her to identify all contributing factors to the accident that she was "not sure" and that Claimant "reports it happened suddenly and she was only carrying a basket of towels." Dora did not mention any door on the form.

7. Claimant reported the accident to a security person, Bob Sutter, on the day of the accident after speaking with Dora. Mr. Sutter noted that Claimant opened a door on her way to the spa and felt a sharp pain on her left side that radiated to her shoulder.

8. The Employer sent Claimant to Concentra on February 17, 2014 where she reported that she dropped off towels and started walking when she felt cramping, spasm

along her left side and into her left shoulder. She denied any direct trauma and did not attribute her symptoms to opening heavy doors.

9. The initial evaluation for therapy on February 17, 2014 notes that Claimant "opened the first door, the second door. She was fine. When she was walking to the spa she felt shortness of breath and felt a pulling, stabbing, burning pain in her flank and into her left shoulder."

10. Claimant reported to St. Anthony North Hospital on April 5, 2014 that she pulled open a heavy door and felt a pop and had immediate pain in her left shoulder.

11. Claimant reported to Dr. Hewitt on April 28, 2014 that she was repetitively opening or pulling open doors when she noted sharp pain in her scapula and posterior shoulder region.

12. Respondents referred Claimant to Dr. Elizabeth Bisgard for an independent medical examination on August 14, 2014. Claimant reported to Dr. Bisgard that she was retrieving towels from the basement for delivery to the spa, and that she carried towels in her right hand and used her left hand to open doors. Claimant pulled a door open with her left hand, and pushed another door open with her left hand. Claimant reported she had no issues at that time, with no immediate pain upon opening doors. Claimant also reported that she was with another co-worker.

13. During the hearing, Claimant testified that on February 17, 2014, she opened the basement two doors and felt fine. Next, she went upstairs through the third floor door. Claimant then went into the spa by opening the door, and went to give towels to the receptionist. She then felt something from her side to her shoulder.

14. The Claimant provided inconsistent reports to her supervisors and her healthcare providers as to what she was doing when she felt pain, where she felt the pain in her body, how the pain manifested itself and what activity allegedly caused the pain. As such, the Claimant's testimony as to the circumstances surrounding the alleged incident and how she was injured lacks credibility.

15. Claimant told Dr. Bisgard that the history from the Concentra physical therapist on the date of the accident was incorrect in that it noted Claimant was experiencing shortness of breath. Claimant indicated, however, in her own Employee Injury Report and Statement on the date of accident that she felt shortness of breath.

16. Claimant reported to her physical therapist in March 2014 that she slipped and fell down the stairs at home right before coming to therapy, landing on her back, and re-injuring her left shoulder. However, Claimant reported this incident to Dr. Bisgard, stating that her left shoulder gave out while she was holding onto the railing, and as a result she fell down five steps injuring her right shoulder.

17. In all, Claimant testified that four separate healthcare providers, and on eight

separate occasions, incorrectly wrote down what she reported to them.

18. Additionally, Claimant was in a car accident in April 2013 after which she had work restrictions of not lifting boxes over 10 pounds.

19. Claimant's December 2013 emergency room records state "moderate, diffuse left side back pain." Claimant also complained of a sensation of chest heaviness and that she could not get a complete breath for the prior 2-3 weeks.

20. Despite Claimant's complaints of pain, after analyzing Claimant's medical records (both pre and post alleged injury), Dr. Bisgard, found that there is no objective evidence of any actual injury and Claimant has no diagnosis. Dr. Bisgard based her opinions on the X-rays of Claimant's shoulders taken after the alleged injury which were normal; and an MRI on April 10, 2014 that showed no rotator cuff tear, no labral tear, no tendon tear and no muscle atrophy or edema. The MRI did reveal mild supraspinatus tendinopathy and a trace amount of fluid in the subacromial subdeltoid bursa suggesting mid bursitis. However, Dr. Bisgard opined that the MRI findings did not indicate any significant pathology that would warrant aggressive intervention.

21. Dr. Bisgard also testified that although Claimant has significant subjective pain complaints, there is no clear mechanism of injury, no pathology, and multiple inconsistencies.

22. Claimant complained of pain levels rated at 9 out of 10 when she had full shoulder range of motion.

23. Claimant complained of pain levels at 8 out of 10, but was observed pulling her hair into a ponytail with her left arm, and she had fluid movement without guarding. Pulling her hair into a ponytail requires overhead use, lifting the left arm, and engaging the shoulder muscles, so her subjective high pain levels were inconsistent with casual observation.

24. Claimant initially presented with pain in her flank area, which is just underneath the armpit, and along her flank which is the side, and to the muscles in her anterior chest wall. Claimant was given Ibuprofen for pain relief, and then a more powerful pain reliever, Tramadol, and Flexeril, which is a muscle relaxer. As Dr. Bisgard noted, the Claimant has not responded to these medications, which is a red flag that there is no pathology of physiology that is causing the pain. Physiologic-based pain would improve with Tramadol and Flexeril.

25. Claimant underwent physical therapy, massage therapy, injections, and took anti-inflammatory medications, narcotics, and muscle relaxers with no relief. Dr. Bisgard also explained that Claimant's lack of improvement with any of this treatment is a red flag that there is something other than pathology present.

26. Dr. Bisgard further testified that in an IME, when she is taking notes, she is

also talking out loud, so that the claimant has the opportunity to correct her if what she says is incorrect and so that it can be corrected in the notes for the IME report. She then testified that the Claimant told her, which she noted in the history section of her IME report, that Claimant was not experiencing any pain, discomfort, or problems during the process of opening or pushing doors and she stated that if the process of pushing or pulling an object is enough to cause pathology in the shoulder, there is immediate pain, not delayed pain. The physical force of pushing or pulling would result in immediate pain, not a delayed onset seconds or minutes later. Finally, Dr. Bisgard testified that it makes no sense that Claimant felt pain in her left shoulder after handing off the towels which she carried with her right hand.

27. Claimant exhibited non-physiological responses during Dr. Bisgard's examination. Dr. Bisgard testified that there is nothing to explain why barely touching the skin of Claimant's back would result in Claimant's describing burning pain; even a person with a significant rotator cuff tear would not have this reaction to touching their skin. Dr. Bisgard was not able to localize any specific area of Claimant's pain. Claimant's sensory changes did not correlate with any specific nerve pattern, which Dr. Bisgard again opined did not make sense. Finally, Dr. Bisgard's range of motion measurements showing limited motion made no sense given that the x-ray and MRI showed no specific pathology, and after comparison with the physical therapist's reports of full shoulder range of motion. Dr. Bisgard felt that Claimant exhibited no effort on testing.

28. Dr. Bisgard opined that Dr. Hewitt and Mr. Rassis, were reaching very far to make a diagnosis of bursitis. Dr. Bisgard stated that Claimant's symptoms were vague and nonphysiologic. Dr. Bisgard also stated that Claimant's MRI scan showing mild bursitis cannot account for her significant range of motion loss or subjective complaints. Initially, Claimant described pain in the serratus anterior along the left midaxillary line, with no glenohumeral joint pain and normal range of motion in her shoulder, but a month later she began describing pain and loss of motion in the glenohumeral joint. Dr. Bisgard found there to be no diagnosis to account for her varying symptoms.

29. Dr. Bisgard went to the Employer's premises to test the resistance of the doors Claimant pushed on February 17, 2014. Dr. Bisgard found that the doors Claimant refers to may be heavy in weight, but there is virtually no resistance. Dr. Bisgard was able to push and pull the doors open using only an index finger. Dr. Bisgard walked through and opened every door Claimant would have accessed from the basement to the spa, and some additional doors.

30. Dr. Bisgard concluded, and the Judge agrees, that Claimant did not sustain a work in any capacity around this timeframe. Dr. Bisgard opined that without a diagnosis, causality cannot be determined.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge enters the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. Section 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

5. Claimant has failed to prove that she sustained a compensable work injury on February 17, 2014. The evidence does not support that any work activity brought on Claimant's subjective pain complaints. The credible and persuasive evidence in the record reflects that Claimant experienced the sudden onset of subjective symptoms in her left side (flank) and shoulder with no precipitating work-related incident. She admittedly did not feel symptoms until after she handed off some towels to another employee. Claimant believed it was the repetitive opening of doors with her left hand, but the evidence does not support that Claimant was repetitively opening doors with her left hand immediately prior to feeling the pain. In her written statement, she expressed that the pain came out of nowhere. The fact the Claimant experienced pain in the

workplace does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007). In addition, Dr. Bisgard credibly opined that Claimant has no diagnosis, and merely has diffuse non-physiologic subjective complaints of pain, which are not attributable to any of Claimant's work activities. Dr. Bisgard's opinions are supported by Claimant's failure to improve with the various medical treatment the Claimant has received.

ORDER

It is therefore ordered that Claimant's claim for benefits under the Colorado Workers' Compensation Act is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 12, 2015

/s/ Laura A. Broniak

_____

LAURA A. BRONIAK
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Has Claimant established by a preponderance of the evidence that she sustained compensable industrial injuries that arose in the course and scope of her employment on January 22, 2014?

2. If the claim is deemed compensable, has Claimant established by a preponderance of the evidence that the need for a general award for medical benefits is reasonably necessary and causally related to Claimant's January 22, 2014, injury?

3. If the claim is deemed compensable, has Claimant established by a preponderance of the evidence that the need for medical treatment in the form of facet injections is reasonable, necessary, and causally related for treatment of her industrial injuries?

STIPULATIONS OF THE PARTES

1. If the claim is deemed compensable, the parties stipulate that Claimant's average weekly wage is $529.99.

2. Claimant stipulated that she is not asserting an occupational disease, but is only proceeding under the allegation that she sustained an industrial injury arising from a discrete accident.

3. Claimant withdrew the issue of temporary disability benefits at hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is employed as a pad printer for the Employer. Claimant's primary job duty as a pad printer is to print or paint labels on small plastic parts with the use of high tech machinery.

2. Claimant alleges that on January 22, 2014, she sustained injuries to her low back and lumbar spine while working as a pad printer for the Employer. Claimant alleges that on January 22, 2014, she was working as a pad printer, standing and unpacking boxes with bags of parts. Claimant alleges that she lifted a bag of parts out of a box, the bag got stuck on the side of the box, and as she was pulling her body twisted and her body was pulled downward.

Claimant testified that during the incident she felt a "pricking" or "popping" sensation in her low back.

3. Claimant testified that she told her "supervisor" that she sustained work injuries. Employer has no record of Claimant reporting alleged injuries on January 22, 2014. Claimant finished her work shift on January 22, 2014.

4. The next day, January 23, 2014, Claimant testified that she called into work and indicated that she would not be present at work due to her work injuries.

5. In contrast to the Claimant's testimony, the personnel manager from Employer, Cathy Cairns, testified credibly that she encountered Claimant around 8:30 a.m. on the morning of January 23, 2014. Ms. Cairns testified that when she encountered Claimant that morning, she was unaware that Claimant was asserting that she had sustained work related injuries. Ms. Cairns testified that she requested that Claimant meet with her in the personnel manager's office to discuss a recent dispute with coworker, Maria Moto-Diaz.

6. Ms. Cairns testified that when she had the discussion with Claimant on January 23, 2014, Claimant became visibly angry. Claimant did not tell Ms. Cairns during this encounter that she was injured and needed to file a workers' compensation claim. Ms. Cairns testified that Claimant did not appear during this conversation be injured or in pain.

7. Ms. Cairns testified that Claimant had been involved with a dispute with a coworker, Maria Moto Diaz, who alleged that Claimant was harassing her. Ms. Cairns became aware of the claim of harassment on January 22, 2014, after she left work for the day. Ms. Cairns spoke with Ms. Diaz via telephone on the afternoon of January 22, 2014, regarding the alleged harassment.

8. Claimant and Ms. Moto-Diaz have a history of work place disputes that predates her alleged date of accident in this case. Claimant agreed that her problems with Ms. Diaz became so upsetting for her that she stopped coming into work in February 2014. Ms. Cairns testified that in February 2014 she attempted to alleviate the problems between the Claimant and Ms. Diaz by putting them on different work, lunch and break shifts.

9. On Friday, January 24, 2014, Claimant worked her regular shift for the Employer. Sometime during the morning of January 24, 2014, Claimant reported to her supervisor, Gabriel Soto, that she had injured her back at work. Mr. Soto requested that Ms. Cairns come down to the factory production floor to discuss Claimant's allegation.

10. Ms. Cairns testified that on January 24, 2014, she met with the Claimant and Gabriel Soto in the factory to discuss Claimant's allegation of work related injuries. Ms. Cairns testified that she conferred with Mr. Soto and confirmed

that this reporting of the incident on January 24, 2014 was the first time that Mr. Soto was aware that the Claimant was alleging work related injuries.

11. Ms. Cairns filed an Employer's First Report of Injury on January 28, 2014, reflecting that the Employer had been notified of Claimant's claim for alleged work related injuries on January 24, 2014. *See Respondents' Exhibit A.*

12. Claimant testified that as a result of the work related injuries, she was experiencing pain located in the center of her back and radiating into the right side of her leg.

13. Claimant agreed that she had experienced the same pain complaints over the past four to five years. Claimant testified that her pain complaints over the past four to five years were in the same location as the pain complaints she had been experiencing since January 22, 2014. Claimant further testified that the type of pain complaints she was experiencing were the same type of pain that she had experienced over the past four to five years. Claimant testified that she believed that her pain had increased in severity after January 22, 2014, as compared to her pain complaints four to five years earlier.

14. Claimant testified that she experienced the onset of pain in her low back over the past four to five years as a result of performing work related duties for the Employer. Ms. Cairns testified that Employer had never been apprised of Claimant's allegation of prior work related injuries sustained sometime four to five years earlier. Ms. Cairns testified that she became aware of this allegation through the pending litigation for Claimant's January 22, 2014 workers' compensation claim. Ms. Cairns and Claimant regularly saw each other at work and have been friendly at work over the past four to five years. Claimant had numerous opportunities to report her prior low back injuries to Ms. Cairns and she never did so.

15. After Claimant reported her work related injuries on January 24, 2014, she commenced treating with Lynne Fernandez, M.D. Claimant's initial consult with Dr. Fernandez occurred on January 24, 2014. Claimant reported to Dr. Fernandez at her initial consultation that she had injured herself when she "lifted a machine at work" and developed pain in her low back and right groin. Claimant alleged pain complaints at level 9/10. Claimant admitted to Dr. Fernandez that her low back pain had initially onset four to five years earlier and had onset while lifting a machine in the same manner that she had done on January 22, 2014. Claimant's report of injury to Dr. Fernandez is inconsistent with the mechanism of injury that Claimant alleged at hearing.

16. Ms. Cairns testified that Claimant's job duties do not require that she lift any machines at work. Ms. Cairns explained that the Claimant works with very large expensive pad printing machines which are not routinely moved for any reason. Ms. Cairns explained that moving the machines can be difficult as the machines have to be perfectly balanced. Ms. Cairns was not aware of

any reason why the Claimant would have moved machines in 2014 or for any reason four to five years earlier.

17. Sara Nowotny testified at hearing regarding her formal job site analysis performed at Employer's factory. Her findings are summarized in a report dated October 9, 2014. Ms. Nowotny testified that she utilized an exertional scale and measured the force required to pull the bag of parts that the Claimant alleged that she lifted on January 22, 2014. The measurements confirmed that pulling the bag required 27 pounds of force. The bag of parts itself weighed 25 pounds and the degree of force required to pull the bag added 2 pounds. Ms. Nowotny's findings and testimony regarding the degree of force require to pull the bag is credited.

18. Ms. Nowotny testified that the Claimant's job position does not require her to move machines. Ms. Nowotny explained that moving the machinery is discouraged because the machinery is high precision machinery that has to be carefully balanced to operate correctly. Ms. Nowotny's job site analysis confirms that moving machinery is not a component of the Claimant's job duties.

19. Dr. Fernandez placed Claimant on work restrictions as of January 24, 2014, limiting her to 15 pounds of lifting. The Employer accommodated the Claimant's restrictions and has continued to accommodate Claimant's restrictions since January 24, 2014.

20. An x-ray of Claimant's lumbar spine taken on February 13, 2014, revealed degenerative changes at L4-5 and L5-S1. Claimant underwent an MRI of her lumbar spine on March 3, 2014, which confirmed additional degenerative changes at L4-5, L5-S1.

21. Claimant returned to Dr. Fernandez on March 11, 2014, for review of her MRI films. Dr. Fernandez opined that it was difficult to determine if the degenerative changes documented at L4-5, L5-S1 were the cause of Claimant's widespread diffuse low back pain complaints. Claimant noted 7/10 level pain, however, Dr. Fernandez noted normal range of motion except slight limitations with extension, no sensory deficit, normal gait, and normal motor findings.

22. On April 17, 2014, Claimant commenced chiropractic manipulations with Marc Cahn, D.C. Claimant described to Dr. Cahn that her injuries had resulted when she was "lifting bags of parts, putting them into carts and then moving the cart to a table where she places the parts. She developed back pain as a result of this repetitive activity." The mechanism of injury that Claimant alleged to Dr. Cahn is different than the mechanism of injury that she alleged at hearing. Claimant admitted to a past medical history significant for a work related lifting injury that occurred two years ago. Claimant did not report to

Dr. Cahn a specific event involving lifting a bag of parts that got caught on a box and feeling a prick or popping sensation as she testified to at the hearing.

23. On August 11, 2014, Claimant was evaluated by John Tobey, M.D. Dr. Tobey recommended consideration of bilateral L4-5, L5-S1 facet joint injections.

24. On September 4, 2014, Claimant underwent an independent medical evaluation with Dr. Carlos Cebrian. Dr. Cebrian testified at the hearing regarding his evaluation, review of Claimant's medical records, the job site analysis, and drafted a report, dated September 10, 2014, summarizing his opinions.

25. Claimant reported to Dr. Cebrian that she had longstanding back pain that was uncomfortable on an almost daily basis for years prior to January 22, 2014. Clamant described to Dr. Cebrian that she would take pain medication on a daily basis for her back pain and that her pain complaints would improve slightly over the weekend with rest. Claimant alleged that on January 22, 2014, she had a specific work related incident that increased her lumbar spine pain. Claimant described that she was opening a box and taking out a plastic bag full of parts when she pulled on the bag, the bag ripped and the parts fell down. Claimant alleged immediate pain in her lumbar spine after performing this activity.

26. Dr. Cebrian opined in his report and testified at hearing that he believed the longstanding daily discomfort that the Claimant experienced in her low back for 3-5 years prior to the date of accident was related to her degenerative changes and Grade 1 spondylolisthesis. Dr. Cebrian opined to a reasonable degree of medical probability that the Claimant did not sustain any injuries or aggravations as a result of the January 22, 2014, work event. Dr. Cebrian further testified that the Claimant's pain complaints in her spine would likely be identical to her presentation today even if she had never come to work for the Employer. Claimant's likelihood for developing back pain on an idiopathic basis are increased based on the fact that she is obese and has a high BMI of 30.9.

27. Dr. Cebrian explained that the experience of back pain at work in conjunction with certain work duties does not mean that there is an injury or aggravation to her lumbar spine. It is not uncommon for individuals with chronic back pain to wake up in the morning after a night of sleep with back pain. The experience of increased back pain in the morning does not mean that sleeping aggravates or accelerates an underlying back condition.

28. Dr. Cebrian explained that the single event of lifting a bag weighing 27 pounds is unlikely to aggravate or accelerate Claimant's pre-existing low back injuries. Dr. Cebrian noted that the Colorado Division of Workers' Compensation Medical Treatment Guidelines explain that for a lifting event to

be causal for back pain, lifting in the range of 50 to 55 pounds performed 10-15 times per day may be causal when performed over a cumulative number of years. By comparison, the discrete lifting event alleged by Claimant to cause her back pain is insignificant and unlikely to aggravate or accelerate pre-existing degeneration of the spine.

29. The medical causation opinion of Dr. Cebrian is credited. There is no other contrary medical opinion analyzing the mechanism of injury alleged by the Claimant at hearing and finding that this one time lifting incident aggravated or accelerated Claimant's low back injuries. Dr. Fernandez has not offered an opinion on causation that supports Claimant's theory because Claimant alleged an entirely different mechanism of injury when evaluated by Dr. Fernandez.

30. The persuasive medical evidence supports the finding that Claimant's back pain is the result of a long standing pre-existing medical condition. The single lifting event that Claimant alleges to have occurred on January 22, 2014, is unlikely to have aggravated or accelerated Claimant's pre-existing back pain. Claimant has alleged multiple mechanisms of injury to various medical providers, which supports the conclusion that Claimant herself does not know what caused her alleged back pain onset.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201(1).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers'

Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. Claimant alleges she proved it is more probably true than not that on January 22, 2014 she sustained an injury or aggravation to her low back and lumbar spine arising out of and in the course of her employment. The credible evidence presented at hearing does not support this conclusion.

4. Claimant was required to prove by a preponderance of the evidence that at the time of the alleged injury she was performing services arising out of and in the course and scope of the employment, and that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

5. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires the claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

6. It is concluded that Claimant failed to establish that the lifting incident on January 22, 2014 caused, aggravated or accelerated her pre-existing degenerative condition in her low back. Claimant admits to have long standing pre-existing daily back pain. The mere occurrence of back pain when performing the lifting duties on January 22, 2014, does not render this event to have caused, aggravated, or accelerated Claimant’s underlying condition.

7. Since Claimant failed to establish a compensable work injury, Claimant has also failed to establish by a preponderance of the evidence that medical treatment generally, and more specifically in the form of facet injections, is reasonable, necessary and/or causally related for treatment of Claimant’s alleged aggravation to her low back and lumbar spine.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits for an alleged January 22, 2014, injury is denied and dismissed.

2. The claim for a general award of medical benefits is denied and dismissed.

3. The claim for medical benefits in the form of facet injections and related expenses is denied and dismissed.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 12, 2015

DIGITAL SIGNATURE:
Margot W. Jones

MARGOT W. JONES
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she injured her left on April 10, 2013?

- If claimant has proven she injured her left knee on April 10, 2013, whether claimant has proven by a preponderance of the evidence that the medical treatment she received to her left knee was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury, including the physical therapy recommended by Dr. Krebs on July 15, 2013?

FINDINGS OF FACT

1. Claimant was employed by employer as a sales associate at their store located in Montrose, Colorado. Claimant began her employment with employer in June 2007. Claimant testified her job duties included providing customer service, setting up merchandise, and working the front registers.

2. Claimant sustained an admitted injury at work on April 10, 2013. Claimant testified that she was retrieving merchandise for a customer in a stockroom when she tripped and fell over fallen shelving. Claimant testified she landed on her backside and her head and right arm jerked backward. Claimant further testified she felt a popping in her left knee after she fell. Claimant reported the injury over the radio to a supervisor, Ms. Moreland, and filled out a report of her injury that day. Claimant testified that she did not initially ask to see a doctor because she thought her symptoms were minor and would improve.

3. Claimant testified that after the injury she experienced symptoms in her left knee, right shoulder, and the right side of her neck. Claimant denied at hearing having experienced symptoms in those parts of her body prior to the April 10, 2013 injury. Claimant testified that she had not seen a doctor for any problems in her left knee in the five years prior to the April 10, 2013 injury.

4. Claimant testified that a few days after the injury, she returned to Ms. Moreland, told Ms. Moreland she was feeling worse, and asked to see a doctor. Claimant testified that she still had pain in her right shoulder, neck, and left knee at that time. Claimant was referred to Dr. Krebs for medical treatment.

5. Claimant was initially evaluated by Dr. Krebs office on April 22, 2013. A nurse in Dr. Krebs's office noted: "On 4/10/13 while working for JC Penney, Connie was walking when she tripped over some shelving that had fallen. She did fall to the ground,

landing on her buttocks and hitting her back on the Sephora gate. She has not been to the ER." The nurse's note further reported that claimant was complaining of pain in her right knee, leg, hip, lower back, arms and mid-upper back. Claimant testified that she did not know why the nurse's report noted a "right" knee injury, and testified that she believed it was a misprint because the injury involved her left knee. In the same medical report, Dr. Krebs noted that claimant had pain in her left knee, low back, right shoulder, mid upper back and also left hip pain. Dr. Krebs diagnosed claimant with joint pain of the left leg. Dr. Krebs further noted that he could not rule out patellar tendinitis or intraarticular meniscal or ligament injury involving the left knee. Dr. Krebs referred claimant for physical therapy.

6. Claimant reported for physical therapy on April 23, 2013. The referral was noted to be for neck pain and right shoulder pain. Claimant reported to the physical therapist that she had neck pain, right shoulder pain, tightness in her upper extremity, left hip pain and low back pain. The physical therapy initial reports do not include a report of left knee pain.

7. Claimant returned to Dr. Krebs on April 30, 2013. Dr. Krebs again noted that claimant possibly had patellar tendinitis or intraarticular meniscal injury and ordered a magnetic resonance image ("MRI") of her left knee.

8. Claimant underwent the MRI of her left knee on May 8, 2013. The MRI showed mild patellar chondromalacia and a "trace popliteal cyst."

9. Dr. Krebs reviewed the MRI results with claimant on May 16, 2013. Dr. Krebs recommended claimant undergo physical therapy for her knee in an attempt to diminish inflammation and irritation to the undersurface of the kneecap. Dr. Krebs also noted that "left chondromalacia patellae" was a work related medical diagnosis in the WC 164 form filled out on May 16, 2013. Dr. Krebs recommended over the counter medications to treat the inflammation.

10. The physical therapy records demonstrate claimant began receiving physical therapy for her left knee by no later than May 20, 2013.

11. Claimant returned to Dr. Krebs on May 29, 2013. Dr. Krebs noted that claimant reported that her pain would come and go. Dr. Krebs noted that there were "days that she feels fine _____ if she goes up and down stairs." Claimant testified that the blank in Dr. Krebs's May 29, 2013 record should have read "worse." Dr. Krebs also noted the possibility of an injection to claimant's left knee.

12. On June 13, 2013, Dr. Krebs recommended four additional physical therapy visits for claimant's left knee symptoms. Dr. Krebs again noted in his Physician's Report that claimant's left knee chondromalacia patellae was a work related medical diagnosis.

13. Claimant returned to Dr. Krebs on July 11, 2013. Dr. Krebs noted: "Over the left knee, she is uncomfortable to palpate medially, laterally, superiorly and inferiorly over the left patella. There does appear to be some tenderness over the left patella as well." Dr. Krebs opined that claimant's symptoms were not surgical issues and should resolve with therapy. Dr. Krebs recommended additional physical therapy for claimant's left knee. During these visits, Dr. Krebs also provided medical care for claimant's ongoing right shoulder problems.

14. Claimant returned to Dr. Krebs on July 11, 2013. Dr. Krebs noted that he had been treating claimant for her left knee chondromalacia and right shoulder tendinitis bursitis. Dr. Krebs further noted on exam that claimant was uncomfortable to palpate medially, laterally, superiorly and inferiorly over the left patella.

15. Claimant again returned to Dr. Krebs on July 30, 2013. Dr. Krebs noted that claimant reported physical therapy was uncomfortable for her. Dr. Krebs recommended claimant hold off on occupational therapy for 2 weeks. This recommendation involved the therapy for claimant's knee and her left shoulder.

16. Claimant was referred at various times to Dr. Parker, Dr. Gilman (for an electromyelogram ("EMG")), and Dr. Heune during her claim for evaluation and treatment of her shoulder and neck symptoms. Claimant testified that she did not discuss her knee symptoms with any of those doctors because her knee symptoms had improved by that time, and because those doctors' care was focused on claimant's shoulder and neck symptoms. Claimant's testimony in this regard is found to be credible and persuasive.

17. Claimant continued to see Dr. Krebs for treatment of her shoulder and neck symptoms. The medical records from Dr. Krebs continue to note claimant's patellar chondromalacia while her medical treatment appeared to begin to focus more primarily on her left shoulder beginning in August 2013.

18. Notably, on September 16, 2013, claimant reported her knee was feeling better, but there was still some popping in the left knee.

19. Claimant underwent an independent medical examination ("IME") with Dr. Scott on October 16, 2013. Dr. Scott reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Scott noted that claimant reported, with regard to her left knee, that she believed her knee popped when she fell at work on April 10, 2013. Dr. Scott noted that the MRI of the left knee showed no evidence for internal derangement of her left knee. Dr. Scott provided opinions related to claimant's shoulder, but did not provide opinions relating to the compensable nature of claimant's alleged knee injury.

20. On February 17, 2014, Dr. Krebs wrote to the nurse case manager for insurer and noted that he did not believe claimant's shoulder condition of left knee

condition were surgical issues. Dr. Krebs noted that claimant could be at maximum medical improvement ("MMI") in approximately 4-6 weeks.

21. On June 27, 2014, Dr. Krebs noted that claimant was complaining of some left knee discomfort. Dr. Krebs noted that the prior MRI scan demonstrating normal ligaments, no medial meniscus tear or lateral meniscus tear with mild chondral fissuring and softening of the medial eminence of the patella. Dr. Krebs noted that claimant was tender over the left and right anterior knee joint line and was tender beneath the left inferior pole of the patella. Dr. Krebs also noted that patella hesitation and patellar grind test are uncomfortable. Dr. Krebs noted claimant had chondromalacia patellae and pain in her lower leg joint. Dr. Krebs noted that claimant's left knee symptoms should be treated with conservative therapy, and recommended physical therapy and medications. Dr. Krebs noted in his Physician's Report that claimant's left knee pain was a work related medical diagnosis. Claimant testified that at the time of this report, her left knee symptoms had improved, but she had occasional symptoms and pain with certain positions.

22. Respondents filed a general admission of liability ("GAL") admitting for benefits resulting from the April 10, 2013 work injury limited to claimant's right shoulder injury on June 30, 2014.

23. Claimant testified that she underwent a right shoulder surgery in August 2014 as part of her claim. Claimant testified that she was off of work for approximately nine weeks, but had returned to light duty work for employer at the end of those nine weeks. Claimant testified that she still had symptoms in her right arm, right shoulder, neck, and left knee. Claimant testified that although her left knee symptoms had improved since the injury, she still had pain in her left knee in certain positions. She testified that her left knee symptoms had never gone away completely since the April 10, 2013 work injury. The ALJ finds the testimony of claimant to be credible and persuasive.

24. Claimant underwent an IME with Dr. Primack on September 24, 2014. The IME included claimant's shoulder condition. Dr. Primack reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Primack noted that claimant did not complain of left knee symptoms during the examination. Dr. Primack opined that the plain film x-rays and left knee MRI were essentially unremarkable except for chondromalacia that was consistent with claimant's age. Dr. Primack provided a diagnosis for claimant's shoulder condition and opined that claimant should be at MMI by the end of November or early December 2014.

25. Dr. Primack testified at hearing, consistent with his September 24, 2014 independent medical examination report. Dr. Primack testified that knee chondromalacia is a degenerative condition that may or may not be symptomatic. He testified that knee chondromalacia could become symptomatic if there is an

aggravation. He testified that knee chondromalacia symptoms could begin in connection with an event or injury.

26. Dr. Primack testified at hearing consistent with his IME report. Dr. Primack testified that claimant was not complaining of knee symptoms when he examined her. Dr. Primack testified that claimant participated in physical therapy, and then stopped doing therapy when she was given exercises and stretches by Dr. Krebs to do at home.

27. The ALJ credits the medical opinions expressed by Dr. Krebs in his records over the contrary opinions expressed by Dr. Primack in his report and testimony and finds that claimant has proven that it is more likely than not that she suffered a compensable injury to her left knee arising out of and in the course of her employment with Employer.

28. The ALJ credits claimant's testimony that she did not experience knee symptoms in her left knee prior to falling while at work on April 10, 2013. The ALJ finds that claimant has proven that it is more likely than not that her left knee became symptomatic when she tripped and fell while at work on April 10, 2013.

29. As such, the ALJ finds that claimant has proven that it is more likely than not that she suffered an injury to her left knee in the course and scope of her employment with Employer on April 10, 2013. The ALJ credits the opinions of Dr. Krebs and the testimony of claimant and finds that claimant has proven that it is more likely than not that the fall at work on April 10, 2013 caused, aggravated, accelerated or combined with a pre-existing condition to result in the need for medical treatment to her left knee. The ALJ credits the reports from Dr. Krebs and finds that claimant has demonstrated that it is more probable than not that the treatment recommended by Dr. Krebs is reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury.

30. The ALJ credits the medical opinions expressed by Dr. Krebs in his records and claimant's testimony over the contrary opinions expressed by Dr. Primack in his report and testimony and finds that claimant has proven that it is more likely than not that the medical treatment she received from Dr. Krebs and from the physical therapists for her left knee was reasonable and necessary to cure and relieve the claimant from the effects of her industrial injury. Specifically, the ALJ finds that the physical therapy recommended by Dr. Krebs on or about July 15, 2013 was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance of the evidence that the medical treatment provided by Dr. Krebs for her left knee condition is related to her April 10, 2013 work injury. As found, the work injury caused, aggravated, accelerated or combined with a pre-existing condition to result in the need for treatment.

5. As found, claimant has proven by a preponderance of the evidence that that medical treatment recommended by Dr. Krebs, including the physical therapy recommended on July 15, 2013, is reasonable and necessary to cure and relieve claimant from the effects of the work injury.

ORDER

It is therefore ordered that:

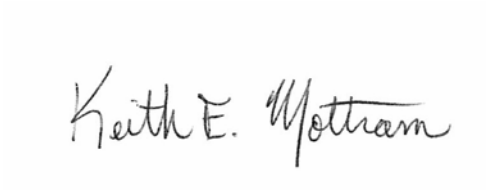
1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury related to her left knee.

2. Respondents shall pay for the physical therapy recommended by Dr. Krebs on July 15, 2013 pursuant to the Colorado Medical fee schedule.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 21, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she suffered a compensable injury arising out of and in the course of her employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the industrial injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to temporary partial disability ("TPD") benefits?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed with employer in the meat and seafood department. Claimant testified she was at work on May 14, 2014 behind the counter in the meat and seafood department and was helping a customer with an order. Claimant testified she finished helping the customer and turned to change her gloves when she caught her right foot and fell awkwardly. Claimant was found unconscious on the floor by a co-worker.

2. Claimant was taken by ambulance to St. Mary's Hospital Emergency Room ("ER"). The hospital records note that claimant was an 82 year old female who was admitted with a chief complaint of loss of consciousness. The ER physician noted that claimant was in her usual state of health and went to work this morning and the next thing she remembers is waking up strapped to a gurney. Claimant reportedly was found by co-workers bleeding from her tongue and left ear. Claimant reported no prior history of syncope or seizures.

3. Claimant was diagnosed with a syncope and collapse and referred for an x-ray of her chest and computed tomography ("CT") scan of her cervical spine and head. The CT scan of her cervical spine showed some degenerative disc disease, but no traumatic fractures or acute alignment abnormalities. The CT scan of claimant's head showed no acute intracranial pathology, no intracranial hemorrhage or mass

lesion and no acute infarction. Claimant was diagnosed with a loss of consciousness with a suspected onset of new seizure given the abrupt loss of consciousness.

4. Claimant underwent a magnetic resonance image ("MRI") of the brain. The MRI showed no acute intracranial abnormality and no finding to explain a possible seizure. Claimant underwent an EEG exam that showed some left temporal spikes and was provided with a prescription for Keppra and given restrictions involving her driving.

5. According to the discharge summary from Dr. Gershten, claimant reported being very fatigued the previous day indicated that she had worked a shift the day before and then cleaned her house, following which she did not sleep well. Dr. Gershten noted that all of these activities could have lowered claimant's seizure threshold. Claimant denied having made these statements to Dr. Gershten and noted that she did not work the day prior to her injury. Claimant further testified that she did not recall having trouble sleeping the night before her injury.

6. Following her treatment at the ER, claimant was not referred by employer for medical treatment. Claimant sought treatment with Dr. Rademacher on May 23, 2014. Dr. Rademacher noted the EEG results and recommended that claimant be evaluated by a neurologist.

7. Claimant was examined by Dr. McDaneld on August 4, 2014. Claimant reported to Dr. McDaneld that she did not remember anything unusual leading up to her episode where she lost consciousness. Dr. McDaneld noted that claimant was sleep deprived prior to her episode. Dr. McDaneld diagnosed claimant with a seizure and noted the results of the EEG exam. Dr. McDaneld noted that the only possible provoking factor was some sleep deprivation, but noted claimant had not had a history of seizures and reported no seizures since the incident. Dr. McDaneld diagnosed claimant with a single unprovoked seizure. Claimant advised Dr. McDaneld that she did not tolerate the Keppra and had weaned herself off the medication. Dr. McDaneld recommended that claimant continue to abstain from driving for 3 months to ensure that she is seizure free and return in 3 months.

8. Claimant testified at hearing that she has remained off the Keppra and has not experienced any more seizures.

9. Claimant testified at hearing that she does not recall being taken to the hospital. Claimant testified that when she got to the hospital, the left side of her head hurt. Claimant testified she still has symptoms including soreness in her back and intermittent numbness in both upper extremities. Claimant testified she thinks she may have struck her head on the metal counter behind the counter when she fell.

10. Claimant was referred for an independent medical examination ("IME") with Dr. Bernton on September 10, 2014. Dr. Bernton reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Bernton noted that claimant had an episode with loss of

consciousness which occurred at work and subsequently recovered. Dr. Bernton opined that it was very unlikely that claimant had a traumatic brain injury with a subsequent seizure.

11. Dr. Bernton testified at hearing consistent with his medical report. Dr. Bernton testified that the EEG showed a discharge consistent with a seizure. Dr. Bernton noted that the medical records could be consistent with claimant having an epileptic seizure and striking her head in the fall, but denied that the medical records would support a finding that the seizure was related to a traumatic event. Dr. Bernton diagnosed claimant with new onset epilepsy. Dr. Bernton acknowledged that this diagnosis is not common for elderly patients, but was the probable diagnosis.

12. Dr. Bernton testified that it was possible that claimant could have fallen and hit her head, but it was not probable. Dr. Bernton acknowledged that the ER records documented that claimant had abrasions and a posterior auricular hematoma. Dr. Bernton further acknowledged that claimant's symptoms following her injury could be consistent with a concussion that could occur with claimant striking her head on the table or floor.

13. Respondent maintains that claimant suffered a seizure while at work that was unrelated to her employment with employer. Respondent argues that the claim is therefore not compensable as the injury resulted from an idiopathic condition unique to claimant and not related to her employment. Claimant, meanwhile, maintains that the injury was a result of a fall at work and is therefore compensable.

14. The ALJ credits the testimony of claimant and the ER records entered into evidence that document claimant having abrasions and a auricular hematoma along with the fact that claimant was bleeding from her ear when she was found by co-workers and finds that claimant has established that she struck her head on the metal table. The ALJ further finds that the metal counter was a hazard of employment that is not ubiquitous and therefore, claimant's injury resulting from hitting her head during the fall are compensable.

15. The ALJ finds that claimant's injury constitutes a compensable injury as claimant was subject to an increased risk of injury particular to her employment by striking her head on the metal table when she fell. In so finding, the ALJ need not consider whether claimant's fall was unexplained or the result of an idiopathic condition as claimant's claim would be compensable under either scenario.

16. The ALJ finds that the medical treatment provided by Dr. McDaneld, Dr. Rademacher and the ER is reasonable and necessary to cure and relieve claimant from the effects of her injury. The ALJ finds that the treatment with the ER is compensable as emergency treatment and the treatment with Dr. Rademacher and Dr. McDaneld is authorized by virtue of employer failing to designate an authorized treating physician.

17. Claimant earned $7,584.66 in the 13 weeks she worked prior to her injury from February 15, 2014 through May 10, 2014. This equates to an AWW of $583.44.

18. Claimant argues that the AWW should be based on claimant's earnings in during the year of 2014 prior to her injury. The ALJ notes that claimant's calculation as argued in the position statement included the number of days in 2014, despite the fact that the wage records demonstrated that claimant's first week of work would have included some days from 2013. In any event, the ALJ finds that the appropriate calculation for her AWW should be based on the 13 weeks prior to her injury which constitute one quarter of a year's worth of wages.

19. Claimant argues that she is entitled to an award of temporary partial disability benefits. However, claimant has failed to establish that her loss of earnings following the injury are related to her work injury. The ALJ notes that the only restrictions provided to claimant by her treating physicians included a limitation on driving. Claimant has failed to establish how her work injury led to a loss of wages other than arguing that her hours with employer were reduced.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-43-201(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201(1), C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201(1), *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. In Colorado, only injuries arising out of and in the course of employment are compensable under the Workers' Compensation Act. *See* Section 8-41-301(1), C.R.S.; *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 2120(Colo. 1996). The terms "arising out of" and "in the course of" are not synonymous, and both conditions must be proven in order to establish entitlement to workers' compensation benefits. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 20 (Colo. 1988).

5. In order to satisfy the course of employment requirement, claimant must show that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her job function. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991).

6. The Colorado Supreme Court recently determined that unexplained falls would be compensable under the Colorado Workers' Compensation Act as resulting from a neutral force and therefore being compensable under the positional risk doctrine. See *City of Brighton v. Rodriguez*, 318 P.3d 496 (2014). In so holding, the Colorado Supreme Court noted that the term "arising out of" refers to the origin or cause of an employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo.2001). Specifically, the term calls for examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Id*. The court noted that an injury "arises out of" employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *City of Brighton, supra.* It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of the injury. *Id.,* citing *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo.1985); and *In re Question*, 759 P.2d at 22 ("The employee need not necessarily be engaged in the actual performance of work at the moment of injury in order to receive compensation.").

7. Respondent argues that claimant's injury is not compensable as the injury was precipitated by a pre-existing condition (new onset epilepsy) brought by the claimant to the workplace. The ALJ is not persuaded. An otherwise compensable injury does not cease to arise out of employment because it is partially attributable to a pre-existing physical infirmity of the employee. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992). Rather, an injury which results from the concurrence of a pre-existing condition and a special hazard of employment is compensable. *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Thus, even if the direct cause of the accident is a preexisting idiopathic disease or condition, the resulting disability is compensable if the conditions or circumstances of employment have contributed to the accident or to the injuries sustained by the employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). To be an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered.

8. In this case, if the claimant was injured as a result of an idiopathic condition that claimant brought to the workplace (epiliepsy) that was unique to claimant,

her injury is not compensable. If claimant was injured as a result of an unexplained fall, the injury is compensable. Likewise, if claimant was injured because she struck her head on the metal counter when she fell, he claim is compensable, because even though claimant fell as a result of the seizure, claimant was placed at an increased risk of injury by virtue of the fact that that she struck the metal counter.

9. As found, claimant has proven by a preponderance of the evidence that she sustained an injury when she struck her head on the metal counter when she fell. Because the metal counter represents an employment hazard that is not ubiquitous, claimant's claim is compensable.

10. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once Respondents have exercised their right to select the treating physician, Claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

11. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

12. As found, claimant has established that the medical treatment at the ER is emergency treatment compensable under the Colorado Workers' Compensation Act. As found, claimant has established that the treatment from Dr. McDaneld and Dr. Rademacher was reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury. As found, claimant has proven that Dr. McDaneld and Dr. Rademacher are authorized to treat claimant for her injury due to the fact that employer failed to designate a treating physician.

13. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. See *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

14. As found, claimant has failed to establish that her injury resulted in her temporary wage loss related to her injury.

15. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

16. As found, claimant has established an AWW of $583.44.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the medical treatment provided by St. Mary's Hospital, Dr. Rademacher, and Dr. McDaneld that is reasonable and necessary to cure and relieve claimant from the effects of the work injury.

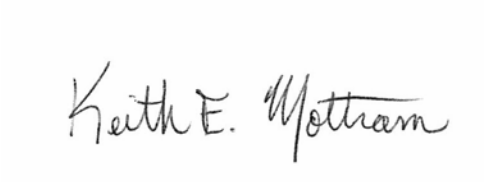
2. Claimant's AWW is $583.44.

3. Claimant's claim for TPD benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 12, 2015



Keith E. Mottram

#JKS1AZYC0D1733v 2

Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

The following issue was raised for consideration at hearing:

The issue raised is whether the left elbow surgery is reasonable, necessary and related to Claimant's work injury of April 17, 2014.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a credible witness and his testimony is both persuasive and consistent with the medical records in the case.

2. Claimant was hired by Employer in July 1984. He has been a lineman for the past eighteen years.

3. On April 17, 2014, while cleaning the lift bucket on his truck to ensure that it could be operated safely, Claimant suffered a fall from a height of approximately 6 to 7 feet. He landed on his back on top of a toolbox in the bed of his truck. He had scrapes on both arms.

4. Claimant testified that following his fall he was hospitalized at the Medical Center of Aurora, where he was diagnosed with multiple rib fractures. He was hospitalized for three days and given narcotic medications. Claimant testified that as he weaned himself from the narcotics he began experiencing pain in his left elbow. The pain was such that he could barely lift light weight objects such as a coffee cup.

5. Claimant was referred to Dr. John Raschbacher and eventually had right shoulder surgery with Dr. James Genuario on August 14, 2014.

6. On May 9, 2014, Claimant underwent a MRI of his left elbow which showed that Claimant had a moderate flexor tendinosis with a fluid-filled longitudinal split delineating a small intrasubstance partial tear.

7. Claimant testified that prior to this MRI he had never undergone diagnostic testing which established the presence of a left elbow tear.

8. Claimant was seen by Dr. Genuario with the authorization of his adjuster on May 28, 2014, complaining of left elbow pain. The diagnosis of left elbow medial epicondylitis was confirmed by Dr. Genuario by the May 9, 2014, MRI.

9. On July 21, 2014, Dr. Genuario diagnosed left medial elbow pain with an added diagnosis of ulnar neuropathy. Claimant underwent an EMG on August 5, 2014, upon referral from Dr. Genuario. This established left ulnar neuropathy at the elbow consistent with cubital tunnel syndrome. Dr. Genuario recommended surgery for this problem.

10. Thereafter, Claimant was seen by Dr. Kavi Sachar on referral from his authorized treating physician (ATP) Dr. Raschbacher. Dr. Sachar evaluated Claimant on August 13, 2014. He described Claimant's left elbow injury consistent with the testimony of Claimant.

11. In response to a letter dated August 21, 2014, concerning left elbow causation, Dr. Sachar stated: "It is not unusual to sustain multiple injuries from a fall from a significant height. Therefore, within a reasonable degree of medical probability, I do believe the patient's left medial epicondylitis and left cubital tunnel are causally related to the injury he sustained on April 17, 2014."

12. Dr. Sachar issued an additional report on October 22, 2014, in which he noted that Claimant had treatment on his left elbow prior to this injury and suggested that Claimant be sent for yet another evaluation to determine causation. This was not done.

13. The medical records establish that the Claimant was evaluated by Dr. Genuario on March 17, 2014. At that time Dr. Genuario stated that Claimant was suffering "Right medial pain, consistent with medial epicondylitis." Additionally, Claimant was having problems in the left elbow for which he was prescribed an anti-inflammatory cream.

14. The pre-injury records from Dr. Genuario do not note the presence of either left ulnar neuropathy or cubital tunnel syndrome, both of which were found after Claimant's injury of April 17, 2014.

15. There is no specific reference to left elbow pain prior to the Claimant's injury of April 17, 2014. In fact, the reports from Dr. Genuario specifically refer to right medial elbow pain with difficulty experienced primarily on the right not the left.

16. Claimant credibly testified that following his appointment of March 17, 2014, he was given left elbow injections which provided him complete relief from left elbow pain. Claimant returned to see Dr. Genuario on April 16, 2014, continuing to complain of bilateral shoulder pain. However, the records from that date failed to show the presence of either right or left medial epicondyle pain.

17. During his direct testimony, Claimant testified that the problem that he was suffering in his left elbow on March 17, 2014, was numbness in the forearm. The report of April 16, 2014, only indicates some pain generally in bilateral arms when lifting.

18. Post injury on April 17, 2014, Claimant was reporting pain in his left elbow, not the numbness reported earlier.

19. The EMG performed by Dr. Joseph Fillmore on August 5, 2014, showed the Claimant was suffering both numbness and tingling in his left arm and had been referred to rule out ulnar neuropathy which was in fact found. Dr. Fillmore notes that the Claimant had a previous history of medical injections to the neck and the right forearm for pain in the past.

20. ATP Dr. Raschbacher has rendered an opinion that Claimant's left elbow ulnar neuropathy is not injury related. This appears to be based primarily on the fact that Claimant had pre-existing treatment for his left elbow. However, none of the treatment that the Claimant underwent in March 2014 was for ulnar neuropathy or cubital tunnel syndrome. Further, ATP Dr. Raschbacher candidly admitted that following his pre-injury left elbow treatment in March 2014, Claimant had no restrictions and that there is no evidence that Claimant was under restrictions at the time he suffered the fall from 6 to 7 feet on April 17, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

2. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S. 2007; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Where the Claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation is sought. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

3. The ALJ finds the opinions of Drs. Genuario and Sachar on causation credible. Claimant has demonstrated that the left elbow surgery recommended by Drs. Genuario and Sachar is reasonable, necessary and related to his injury of April

17, 2014. This is supported by the MRI of May 9, 2014, and the reports of both Drs. Genuario and Sachar.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

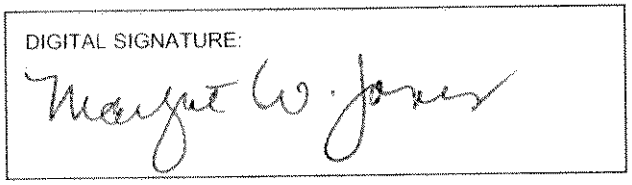
1. Respondents shall be liable for the recommended surgery for Claimant's left elbow, which is found to be reasonable and necessary medical treatment related to Claimant's April 17, 2014, work injury.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _January 22, 2015____

DIGITAL SIGNATURE:



Margot W. Jones
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

- Did the claimant prove by a preponderance of the evidence that he sustained one or more occupational diseases proximately caused by the performance of service arising out of and in the course of his employment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant's Exhibits 1 through 8 were admitted into evidence. Respondents' Exhibits A through H were admitted into evidence.

2. The parties stipulated that if the claim is found compensable the claimant's average weekly wage is $1210.69. They further stipulated that if the claim is found compensable the claimant is entitled to temporary total disability benefits commencing October 7, 2014 until reduced or terminated pursuant to the Act or WCRP. The parties further stipulated that Concentra Medical Centers and Tracy Wolf, M.D., are authorized treating medical providers. The parties further stipulated that the surgery performed by Dr. Wolf on October 8, 2014 constituted reasonable and necessary medical treatment. However, the respondents dispute whether the need for the surgery was proximately caused by any alleged occupational disease(s) arising out of and in the course of the claimant's employment.

3. The claimant has worked as a delivery driver for the employer for twenty-eight years. The claimant works four days per week for up to 14 hours. On Mondays he drives a large tractor-trailer from Denver to Canon City where he delivers food products to various restaurants and institutions. He also makes deliveries on Tuesday. He then drives to Pueblo where he picks up tortilla chips and returns to Denver. The claimant repeats this itinerary on Thursdays and Fridays.

4. The claimant testified as follows. When he is making deliveries he enters the trailer and unloads products onto a two wheeler. He then transports the products down a ramp from the truck and typically stacks them inside the customer's facility. He stated that he lifts 10,000 to 15,000 pounds of product per day. When delivering products he is required to grasp and lift bags and boxes weighing between 1 and 100 pounds. He estimates the average lift is 35 pounds. He makes 60 to 70 trips up and down the ramp per day. When he is driving the truck he experiences vibration from the steering wheel and the gear shift.

5. The claimant testified as follow concerning the events of April 4, 2014. He experienced pain in his elbows and hands which caused difficulty when moving cases of

product. His grip strength was reduced so that he dropped some items. He had experienced these symptoms prior to April 4 but the problem "came to a head" on this date and he believed he might need medical attention for his symptoms.

6. On April 15, 2014 Carrie Burns, M.D., examined the claimant at Concentra. The claimant gave a history that his job required loading and unloading of multiple boxes of varying weights. He had experienced problems with both arms over the "past few years" and was now complaining of bilateral elbow pain and swelling. The claimant also reported pain shooting pain from the "elbow to the palm with accompanying tingling of his pinky finger" and pain in the "knuckle" of his right middle finger. The claimant reported he received steroid injections many years ago for the finger problems. On examination Dr. Burns noted some "mild motor deficits with both ulnar and medial testing." There was mild bilateral swelling of the elbows with tenderness to palpation of the medial epicondyles on the right and left. Dr. Burns assessed bilateral epicondylitis, bilateral ulnar neuritis, "likely CTS" and right hand pain "at mcp of 3rd finger and thumb." Dr. Burns opined the claimant's bilateral hand and elbow problems likely resulted from "cumulative trauma from his job." Dr. Burns prescribed Naproxen, occupational therapy and an ergonomic evaluation. He released the claimant to return to work at regular duty and referred the claimant to "hand surgery."

7. On April 18, 2014 hand surgeon Tracy Wolf, M.D. examined the claimant. Dr. Wolf assessed bilateral medial epicondylitis, bilateral hand numbness most consistent with "probable ulnar neuropathy coming from the elbow and possible right middle trigger finger." Dr. Wolf stated that not much could be found with respect to the finger. With respect to the suspected ulnar neuropathy Dr. Wolf recommended "getting a nerve test" and stated surgery would be recommended if the findings were severe and the claimant was having "some motor changes."

8. On May 16, 2014 Colleen Waterous of Genex performed a job site evaluation of the claimant's duties. This was on referral from Concentra Medical Centers (Concentra). The claimant participated in the evaluation and provided information to Ms. Waterous. The report states that the claimant engaged in "frequent" lifting of 26 to 50 pounds and occasional lifting of 51 to 100 pounds. He frequently used a firm "power grip" while using the "hand truck," pulling himself into the cab of the truck and carrying product." He was frequently exposed to "flexion/extension/deviation." He was frequently exposed to hand and arm vibration when driving the truck. The report states the "frequent" exposure is one that occurs 34-66% of the time with 13 to 30 repetitions per hour and 101 to 245 repetitions per day.

9. The Genex report states that pursuant to the Colorado Medical Treatment Guidelines (MTG) the claimant was exposed to the "primary risk factor" of awkward posture and repetition/duration. Specifically he was exposed to 4 hours of wrist flexion greater than 45 degrees, extension of greater than 30 degrees or ulnar deviation greater than 20 degrees. The report also indicates the claimant was exposed to the "secondary risk factor" of force and repetition/duration. Specifically the claimant was exposed to 4 hours of lifting 10 pounds more than 60 times per hour.

10. On August 12, 2014 Scott London, M.D., performed nerve conduction testing of the claimant's upper extremities. His impressions included severe left ulnar entrapment at the elbow or cubital tunnel without evidence of median nerve dysfunction. He noted an absent left ulnar sensory response and chronic denervation from the distal ulnar innervated musculature. There was no evidence of right ulnar nerve entrapment.

11. Dr. Wolf examined the claimant on August 19, 2014 and reviewed the results of the electrodiagnostic study performed by Dr. London. On August 19 the claimant was complaining of pain at the inner aspect of his elbows. On the left there was numbness in the small and ring fingers and the claimant felt the left small finger was swollen. The right middle finger had not been "catching" since Dr. Wolf's last examination. Dr. Wolf assessed severe left ulnar neuropathy at the elbow and left epicondylitis. She recommended a left nerve release and medial epicondylectomy. She assessed "right ulnar nerve symptoms" and performed an injection for this.

12. On October 6, 2014 Jeffrey Wunder, M.D. performed an independent medical evaluation (IME) of the claimant at the respondents' request. Dr. Wunder is board certified in occupational medicine and is level II accredited. Dr. Wunder took a history from the claimant, reviewed medical records and performed a physical examination. Dr. Wunder noted that in 1990 the claimant had bilateral palmar pain and pain into the fifth digit. At that time he received an injection into the right wrist. He also received multiple injections for a right middle trigger finger. Dr. Wunder noted that in 2012 Dr. Kawasaki treated the claimant for neck pain with radiation into the right upper extremity after some bread products fell on him. The claimant reported pain and tingling in the right hand. The claimant had left interosseous muscle atrophy and a positive Tinel sign at the left elbow. Dr. Kawasaki reportedly diagnosed right C6 radiculopathy and left ulnar neuropathy "longstanding and probably not work related." The claimant underwent an MRI that showed foraminal stenosis at C5-6. He also underwent electrodiagnostic studies of both upper extremities. The right sided tests were negative and the left sided study revealed ulnar neuropathy "with both acute and chronic axonal change."

13. On October 6, 2014 Dr. Wunder noted the claimant reported bilateral upper extremity pain with the left worse than the right. There was pain at the medial left elbow but the claimant did not describe a lot of pain on the right side. The claimant also reported numbness and tingling on the ulnar side of the both palms going into the fifth digits. Dr. Wunder noted mildly positive Tinel's signs at the cubital tunnels on the right and left. The wrists were non tender. There was a positive carpal compression test but this was in the median nerve distribution rather than on the ulnar side of the hand. Dr. Wunder considered this finding to be "unexpected." There was no triggering in the fingers of either hand. Dr. Wunder assessed "nonspecific bilateral hand pain" and chronic left ulnar neuropathy at the elbow, "longstanding and unrelated to work activities." At the elbows there "was no tenderness either medially or laterally." Dr. Wunder opined the left-sided muscle atrophy was a longstanding issue that had not worsened since the claimant saw Dr. Kawasaki in 2012. Dr. Wunder stated there was no evidence of carpal tunnel syndrome, tendonitis or trigger finger. Dr. Wunder opined the claimant's work activities did not require forceful wrist mobility in combination with

unusual positions and he could "not attribute any diagnosis to his work-related activities."

14. On October 8, 2014 Dr. Wolf performed a left ulnar nerve release at the elbow with a medial epicondylectomy. On October 21, 2014 Dr. Wolf noted the claimant had restrictions of no repetitive wrist or elbow motion, no repetitive lifting, gripping or grasping with the left arm and a lifting restriction of 2 pounds on the left.

15. Dr. Wunder testified at the hearing. Dr. Wunder testified that since his report he had reviewed the Genex evaluation and heard the claimant testify concerning his work activities. Dr. Wunder testified that he believed he fully understands the claimant's job duties.

16. Dr. Wunder testified as follows concerning application of the WCRP 17, Exhibit 5, the Cumulative Trauma Conditions Medical Treatment Guidelines (MTG). Dr. Wunder explained that the MTG were prepared by a panel of physicians who reviewed the medical literature and latest studies to formulate a document to assist physicians in determining the cause of cumulative trauma conditions. Dr. Wunder explained the MTG are "advisory" with respect to a diagnosis and the ultimate diagnosis of a condition is to be made by the clinician.

17. Dr. Wunder testified that under the MTG the first step in identifying the cause of a cumulative trauma disorder is to make a diagnosis. Dr. Wunder opined the claimant's diagnosis is left ulnar neuropathy, also known as left cubital tunnel syndrome. Dr. Wunder opined this diagnosis is severe "end stage" disease in light of interroseous muscle weakening in the left hand. Dr. Wunder did not find evidence of right cubital tunnel syndrome or any other right-sided disease process. He noted that he performed a Tinel's test at the right wrist which produced symptoms in the 4th and 5th fingers. Dr. Wunder explained this was not an anatomically correct response to the test. Dr. Wunder did not find evidence of any right-sided trigger fingers and stated there was no evidence of carpal tunnel syndrome on EMG examination.

18. Dr. Wunder opined that the condition of left ulnar neuropathy is subject to a causation analysis under the MTG. He explained the next step is to compare the activities performed in the workplace to the cumulative trauma risk factors identified in the "Risk Factors Definitions" table contained in the MTG. The clinician then goes to the Diagnosis Based Risk Factors table to determine if there is literature supporting a causal relationship between the duties of employment and the particular diagnosis.

19. Dr. Wunder testified that in order to put the ulnar nerve at risk there is a requirement for forceful flexion of the elbow and he explained that when the elbow is relaxed there is no pressure on the ulnar nerve. In this regard he noted that the MTG state that a positive elbow flexion/ulnar compression test is one of the exam findings that will support a diagnosis of ulnar neuropathy. Dr. Wunder noted that the Genex report and the claimant's testimony identified exposure to the "primary risk factor" of "wrist activity." However, Dr. Wunder explained that wrist activity is not physiologically related to the diagnosis of ulnar neuropathy since wrist activity alone does not involve

elbow flexion. Dr. Wunder also explained that under the Genex evaluation the claimant was exposed to the "secondary risk factor" of 4 hours of lifting 10 pounds at least 60 times per hour. However, Dr. Wunder opined that lifting is not physiologically associated with ulnar neuropathy although it may be pertinent to other cumulative trauma disorders. Dr. Wunder also noted that the Diagnosis Based Risk Factors table states there is a study indicating that a combination of forceful tool use, repetition and probably posture for 6 hours (holding a tool in position with repetition) is associated with cubital tunnel syndrome. However, Dr. Wunder opined that this combination of factors is not present in the claimant's job duties.

20. Dr. Wunder opined to a reasonable degree of medical probability that the claimant's upper extremity symptoms are not the result of an injury or occupational disease caused by the duties of his employment. He explained that ulnar neuropathy may appear "spontaneously" without any identifiable cause.

21. Dr. Wunder testified that none of the Concentra providers, including Dr. Burns, applied the MTG in assessing the cause of the claimant's condition(s). He further noted that Dr. Wolf did not render any opinion concerning the cause of the claimant's diagnoses.

22. Dr. Wunder opined the surgery performed by Dr. Wolf is not related to his employment.

23. The claimant failed to prove that he suffers from any disease or disease process that was proximately caused, intensified aggravated or accelerated by exposure to any hazards of his employment.

24. Dr. Wunder credibly and persuasively testified that his physical examination and the results of the electrodiagnostic testing support only the diagnosis of left ulnar neuropathy (left cubital tunnel syndrome).

25. Dr. Wunder persuasively opined that the claimant does not exhibit any evidence of the disease of a right "trigger finger." This opinion is corroborated by Dr. Wolf who opined on April 18, 2014 that it was only "possible" the claimant had triggering of the right middle finger and "not much could be found" with respect to this condition. On August 19, 2014 Dr. Wolf noted the right middle finger had not been "catching" since the last examination and did not seem "to be a problem."

26. Dr. Wunder persuasively opined that on examination of the claimant he did not find evidence of any disease process except left ulnar neuropathy. Although Dr. Burns and Dr. Wolf diagnosed right and left medial epicondylitis, Dr. Wunder found no evidence of this condition on examination of the claimant. Indeed, the claimant reported no tenderness at the medial aspect of the elbows when he was examined by Dr. Wunder, just two days prior to the surgery performed by Dr. Wolf. The electrodiagnostic testing performed by Dr. London failed to demonstrate evidence of right ulnar neuropathy, and Dr. Wunder persuasively opined that the claimant exhibited

"unexpected" and anatomically incorrect symptoms in the right ulnar distribution when he performed a Tinel's test at the wrist.

27. The opinion of Dr. Wunder and the results of electrodiagnostic testing establish the claimant does not have carpal tunnel syndrome. Dr. Wunder's opinion is supported by Dr. Wolf who did not diagnosis left or right carpal tunnel syndrome.

28. Dr. Wunder persuasively opined that application of the MTG to the claimant's diagnosis of left ulnar neuropathy does not support a finding that there is a causal relationship between the claimant's employment and the disease process. The MTG provide that when the claimant "meets the definition of a sole Primary Risk Factor and the risk factor is physiologically related to the diagnosis, it is likely that the worker will meet causation for the cumulative trauma condition." The MTG further provide that where the "Primary Risk Factor identified is not physiologically related to the diagnosis, causation will not be established at this point and Step 4 needs to be considered." (Respondents' Exhibit A, p. 10). Dr. Wunder considered the Genex job analysis and the claimant's testimony and determined that the only "Primary Risk Factor" present in the claimant's job duties was "wrist activity." Dr. Wunder persuasively explained that "wrist activity" is not physiologically associated with the diagnosis of ulnar neuropathy because it does not involve elbow flexion and consequent stress to the ulnar nerve. Dr. Wunder also persuasively opined that although the claimant's job involved the "Secondary Risk Factor" of 4 hours of lifting 10 pounds more than 60 times per hour, that risk factor did not satisfy the specific criteria for the "Diagnosis Based Risk Factors" for Cubital Tunnel Syndrome. Dr. Wunder persuasively explained that Diagnosis Based Risk Factors table states there is a study indicating that a combination of forceful tool use, repetition and probably posture for 6 hours (holding a tool in position with repetition) is associated with cubital tunnel syndrome. However, Dr. Wunder credibly opined that this combination of factors is not present in the claimant's job duties. Dr. Wunder credibly opined that none of the risk factors identified by the Genex studies is associated with the diagnosis of ulnar neuropathy.

29. Dr. Wunder credibly explained that physical activity is not a prerequisite to the development of ulnar neuropathy and that the condition may appear "spontaneously" in some patients. The ALJ finds that this credible testimony and the persuasive evidence that the duties of the claimant's employment are not a causative or aggravating factor in the development of left ulnar neuropathy, that the most likely cause of the claimant's left ulnar neuropathy is the "idiopathic" appearance of the disease in the claimant's left elbow.

30. The ALJ places significant weight on the MTG causation analysis and Dr. Wunder's application of that analysis. Dr. Wunder credibly explained the MTG causation algorithm is based on review of the best studies and literature pertaining to the causes of cumulative trauma conditions. Dr. Wunder persuasively applied the MTG and explained his opinion that the MTG do not support a finding that there is a causal relationship between the claimant's left ulnar neuropathy and the conditions of his employment.

31. The ALJ further finds it significant that Dr. Wolf has not offered any opinion concerning the causes of her diagnoses. Therefore her opinions have no persuasive effect on the issue of the cause of the claimant's condition. Further Dr. Burns did not purport to apply the MTG when opining that the claimant has sustained several work-related cumulative trauma conditions. Therefore, Dr. Burns' opinions are not as credible and persuasive as those expressed by Dr. Wunder.

32. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

COMPENSABILITY OF ALLEGED OCCUPATIONAL DISEASE

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). An "occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the

> employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005).

Expert medical opinion “is neither necessary nor conclusive in determining causation.” However, when expert medical opinions are presented it is for the ALJ to determine the weight to be accorded such opinions. *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990).

When evaluating this issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers’ compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As determined in Findings of Fact 23 through 31 the claimant failed to prove it is more probably true than not that he sustained an occupational disease proximately caused, intensified or aggravated by the conditions under which he performed his employment. As found, Dr. Wunder credibly and persuasively opined that the claimant’s only diagnosis is left ulnar neuropathy. Dr. Wunder credibly and persuasively

applied the causation algorithm contained in the Cumulative Trauma MTG and opined that the diagnosis of left ulnar neuropathy is not causally related to the duties of the claimant's employment as evidenced by his own testimony and the Genex job analysis.

The claimant cites *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014) for the proposition that the claimant's left ulnar neuropathy arose out of his employment because it was the result of a "neutral" or unexplained cause. However, as determined in Finding of Fact 29, the ALJ has found the most probable cause of the left ulnar neuropathy is the idiopathic development of the disease without any contribution from risk factors encountered in the claimant's employment. Therefore, the credible and persuasive evidence establishes that the disease of left ulnar neuropathy resulted from a "personal" or idiopathic cause and did not arise out of the claimant's employment. Therefore, the holding in *City of Brighton* is inapplicable to the facts of this case.

ORDER

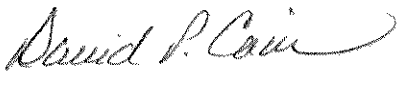
Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in WC 4-952-008 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 21, 2015

DIGITAL SIGNATURE:



David P. Cain
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable occupational disease during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his occupational disease.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary disability benefits for the period October 29, 2013 until terminated by statute.

FINDINGS OF FACT

1. On January 12, 2012 Claimant began working for Employer as a Janitor. He was promoted to Production Lead in April 2012. Claimant's job duties involved supervising the organization of goods for sale and performing the duties of absent employees.

2. The warehouse positions of Belt Loader and Forklift Operator were responsible for moving furniture and boxes weighing up to 500 pounds from the production area to the storage area. The employees working in the positions of Belt Loader and Forklift Operator quit on the same day in September 2012. The positions were not filled until March 2013. Claimant testified that, as the Production Lead, he was responsible for performing the duties of Belt Loader and Forklift Operator during most of his shifts between September 2012 and May 2013.

3. Claimant asserts that he suffered an occupational disease with a date of onset of January 1, 2013. He specifically described his occupational disease as micro traumas caused by his work duties that acted upon his "genetically weak neck and back" to create various symptoms.

4. Claimant clarified the medical benefits that he seeks. Specifically, Claimant stated that he desires reimbursement for three visits at the University of Colorado Hospital with Matthew Leiszler, M.D. in the amount of $35 each. He also seeks reimbursement in the amount of $535 for a May 2, 2013 MRI. Claimant finally wants payment for services of chiropractor Dan Carluccio, D.C. in the amount of $5,850.

5. In March of 2013 Claimant began treatment at the University of Colorado Hospital with Dr. Leiszler. His first visit occurred on March 11, 2013. The History section of the treatment notes provide, "[Claimant] states he thinks that he might have

MS. Symptoms going on for 7+ years. Blackouts, loss of balance, chest pains, tingling in fingers…" Claimant also reported chest pressure, blacking out once or twice per day for the past 3-4 years, twitching in his arms, tingling in his hands at times, short-term memory impairment, slurred speech and body shakes. Dr. Leiszler recommended diagnostic testing. Claimant thus underwent a brain MRI on May 2, 2013, labs on May 6, 2013 and an X-ray of his cervical spine on September 17, 2014. The preceding testing did not identify any basis for Claimant's symptoms.

6. Chiropractor Dr. Carluccio has treated Claimant for his symptoms. He testified that he lives in Claimant's neighborhood, ran into him a number of times, considered Claimant's symptoms and discussed tests that were performed at University of Colorado Hospital. The symptoms Claimant mentioned included dizziness, balance issues, spontaneous collapses of a synoptic nature (without loss of consciousness), mentation issues, speech issues, intermittent tremors of the upper extremities, leg weakness, pain and numbness in the upper and lower extremities, intermittent nausea, extreme need to sleep, extreme intolerance to cold, migraines and constant tension in the right temple. Dr. Carluccio testified that he was with Claimant more than once when Claimant would start to fall and had to be caught. He remarked that Claimant told him he could just be walking and collapse both during and outside of work. Dr. Carluccio commented that one day while discussing matters with Claimant on a street in their neighborhood, he realized that Claimant's symptoms were similar to those of his other patients. After gently pressing an area of Claimant's skull, Dr. Carluccio suspected that Claimant's symptoms were related to his neck. Dr. Carluccio thus began to treat Claimant in May of 2013.

7. Dr. Carluccio testified that Claimant's pre-existing condition was upper cervical instability causing neurological deficits that he considered related to Atlanto-Occipital Syndrome. He explained that "classic" Atlanto-Occipital Syndrome is very often correlated with Downs Syndrome children and involves a laxity of the ligaments. However, Dr. Carluccio remarked that he was using the term in the chiropractic sense. He thus meant "a chiropractic disrelationship or malfunction between the functional dynamics of the skull and [Claimant's] first neck bone, as opposed to a syndrome." Dr. Carluccio acknowledged that he did not have copies of Claimant's medical records, has done no diagnostic testing and has not taken any specific measurements of the spine or any gaps in the spine. Dr. Carluccio explained that he believed Claimant was initially injured when he was 11 years old and kicked three times behind his head during a black belt karate test. He commented that there was no treatment for neck issues following the incident. Although Claimant told him that his symptoms began while working for Employer, Dr. Carluccio determined the kicks at age 11 were the source of Claimant's "disastrous" cervical function.

8. Dr. Carluccio testified that Claimant's work related diagnosis was repetitive over-demanding actions that exploited his Occipital Atlanto and C2 weakness. He detailed that when Claimant was asked to do more physical work he would have to grab behind him, pull a dolly and "torque his whole system to pull it." The motion involved tilting his head to one side at an angle with rotation of the neck. Dr. Carluccio commented that the movement was compressing Claimant's head and exploiting the

pre-existing weakness. He explained that Claimant's symptoms could occur both at work and outside of work. Dr. Carluccio noted that Claimant's activity at work caused his neck to become "stuck" and produced the symptoms outside of work.

9. Dr. Carluccio acknowledged that he was not familiar with the Division of Workers' Compensation Rule 17, Exhibit 5 "Guidelines for Cumulative Trauma Conditions" (Guidelines). Dr. Carluccio testified that he did not follow the method outlined in the Guidelines to arrive at his diagnosis. He also acknowledged that he was unaware of any evidence-based studies that correlated his diagnosis to Claimant's work activities.

10. Dr. Carluccio testified that after six months of chiropractic treatment Claimant's condition significantly improved. Although Claimant still has some balance issues when he gets up, he has improved 98% from the effects of his work exposure. Dr. Carluccio remarked that Claimant has not suffered any permanent physical impairment related to the work duties.

11. Claimant testified that on approximately January 1, 2013 he began experiencing symptoms that affected his work performance and quality of life. His symptoms included a persistent headache, collapsing during and after work, vertigo, momentary loss of consciousness, numbness of the extremities, twitching hands, cold sensitivity, requiring sleep of 12 hours per day and diminished cognitive function. He reported his symptoms to Employer and was directed to medical treatment. Notably, Claimant testified that all of the University of Colorado testing as well as Dr. Carluccio's chiropractic treatment preceded his report of a Workers' Compensation injury to Employer.

12. On February 14, 2014 Claimant visited Authorized Treating Physician (ATP) Elizabeth W. Bisgard, M.D. for an examination. Dr. Bisgard reviewed Claimant's diagnostic testing and the medical records of Dr. Carluccio. She summarized that "[a]fter review of these records, we have no clear diagnosis. Without a diagnosis, we cannot even begin the process of a causality assessment. He is having pain. There is no etiology, therefore there is no causal relationship to work."

13. On November 10, 2014 Douglas C. Scott, M.D. conducted an independent medical examination of Claimant. He also testified at the hearing in this matter. Claimant reported that he developed neck pain, back pain, headaches, dizziness and momentary loss of consciousness as a result of his work activities by January 1, 2013. Dr. Scott performed a physical examination of Claimant. Claimant did not report pain when he moved his neck. Dr. Scott noted that Claimant's neck motion was excellent and within normal ranges. Claimant did not exhibit any evidence of nerve root compromise causing pain or symptoms into his extremities. He also did not demonstrate any balance problems.

14. Dr. Scott reviewed Claimant's MRI and medical records. He remarked that there was no confirmation of any medical diagnosis of Claimant's symptoms and therefore could not assess whether Claimant's work activities caused an occupational

disease. Although Dr. Carluccio noted that Claimant suffered from the chiropractic diagnosis of Atlanto-Occipital Syndrome, Dr. Scott remarked that there was no objective medical documentation or radiographic studies to support Dr. Carluccio's determination. Specific measurements must be taken radiographically to establish that there is a qualifying increased interval between the atlas, the axis and the occipital to support the diagnosis of Atlanto-Occipital Syndrome. The requisite measurements were not performed on Claimant.

15. Dr. Scott stated that there was no cervical neck problem confirmed by the MRI scan. He explained that it was not probable that Claimant has Atlanto-Occipital Syndrome caused by a traumatic event when he was 11 years old. There is simply no evidence that there was movement of the spine at the time of the incident. If the black belt testing caused subluxation or movement in the cervical spine, Claimant would have suffered a very serious medical condition. However, Claimant did not receive any medical treatment after he was kicked in the head when he was 11 years old. Dr. Scott testified that if the kicks had caused movement of the spine Claimant would probably have required hospitalization and immobilization. He also explained that a dislocation at the relevant area of the spine would cause death. Finally, the MRI did not show current subluxation in the relevant area of the spine.

16. Claimant has failed to establish that it is more probably true than not that he sustained a compensable occupational disease during the course and scope of his employment with Employer. Claimant asserts that he suffered an occupational disease with a date of onset of January 1, 2013. Claimant specifically described his occupational disease as micro traumas caused by his work duties that acted upon his "genetically weak neck and back" to create various symptoms. Chiropractor Dr. Carluccio testified that Claimant's pre-existing condition was upper cervical instability causing neurological deficits that he considered related to Atlanto-Occipital Syndrome. He explained that Claimant was initially injured when he was kicked three times behind his head during a black belt karate test at 11 years old. Dr. Carluccio detailed that when Claimant was asked to do more physical work for Employer he would have to grab behind him, pull a dolly and "torque his whole system to pull it." The motion involved tilting his head to one side at an angle with rotation of the neck. Dr. Carluccio commented that the movement compressed Claimant's head and exploited the pre-existing weakness.

17. In contrast, Drs. Bisgard and Scott persuasively determined that there was no confirmation of any medical diagnosis of Claimant's symptoms and therefore they could not assess whether Claimant's work activities caused an occupational disease. Dr. Scott explained that there was no cervical neck problem confirmed by the MRI scan. He also noted that it was not probable that Claimant has Atlanto-occipital Syndrome caused by a traumatic event when he was 11 years old. There is simply no evidence that there was movement of the spine at the time of the incident. Moreover, although Dr. Carluccio noted that Claimant suffered from the chiropractic diagnosis of Atlanto-Occipital Syndrome, Dr. Scott remarked that there was no objective medical documentation or radiographic studies to support Dr. Carluccio's determination. Finally, Dr. Carluccio agreed that he was not familiar with the Guidelines and did not follow the

method outlined in the Guidelines to arrive at his diagnosis. Moreover, he acknowledged that he was not aware of any evidence-based studies that correlate his diagnosis to Claimant's work activities. Accordingly, Claimant has not demonstrated that the hazards of his employment caused, intensified, or, to a reasonable degree, aggravated a pre-existing condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

8. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable occupational disease during the course and scope of his employment with Employer. Claimant asserts that he suffered an occupational disease with a date of onset of January 1, 2013. Claimant specifically described his occupational disease as micro traumas caused by his work duties that acted upon his "genetically weak neck and back" to create various symptoms. Chiropractor Dr. Carluccio testified that Claimant's pre-existing condition was upper cervical instability causing neurological deficits that he considered related to Atlanto-Occipital Syndrome. He explained that Claimant was initially injured when he was kicked three times behind his head during a black belt karate test at 11 years old. Dr. Carluccio detailed that when Claimant was asked to do more physical work for Employer he would have to grab behind him, pull a dolly and "torque his whole system to pull it." The motion involved tilting his head to one side at an angle with rotation of the neck. Dr. Carluccio commented that the movement compressed Claimant's head and exploited the pre-existing weakness.

9. As found, in contrast, Drs. Bisgard and Scott persuasively determined that there was no confirmation of any medical diagnosis of Claimant's symptoms and therefore they could not assess whether Claimant's work activities caused an occupational disease. Dr. Scott explained that there was no cervical neck problem confirmed by the MRI scan. He also noted that it was not probable that Claimant has Atlanto-occipital Syndrome caused by a traumatic event when he was 11 years old. There is simply no evidence that there was movement of the spine at the time of the incident. Moreover, although Dr. Carluccio noted that Claimant suffered from the chiropractic diagnosis of Atlanto-Occipital Syndrome, Dr. Scott remarked that there was

no objective medical documentation or radiographic studies to support Dr. Carluccio's determination. Finally, Dr. Carluccio agreed that he was not familiar with the Guidelines and did not follow the method outlined in the Guidelines to arrive at his diagnosis. Moreover, he acknowledged that he was not aware of any evidence-based studies that correlate his diagnosis to Claimant's work activities. Accordingly, Claimant has not demonstrated that the hazards of his employment caused, intensified, or, to a reasonable degree, aggravated a pre-existing condition.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 23, 2015.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment?

II. Did Claimant prove by a preponderance of the evidence that she is entitled to an award of temporary total disability (TTD) benefits?

III. Did Claimant prove by a preponderance of the evidence that she is entitled to an award of medical benefits for her treatment with Concentra, Absolute Health Centers, Dr. Jeffrey Jenks, Penrose-St. Francis emergency room and Southwest Diagnostic Centers?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant worked for Employer as a cashier for approximately six (6) months prior to the date of injury. Although she was originally hired as a part time employee, her hours increased to the point that she was working full time on the date of her injury.

2. Claimant testified that customers would normally approach the checkout counter from her left side and she would then scan the items which were being purchased. She would then have to twist to her right to access the cash register and complete the transaction. On average she would check out approximately 200 people every shift. She would perform the aforementioned twisting motion for every transaction, whether it was cash or a credit transaction.

3. While checking out a customer on June 21, 2014, Claimant scanned a customer's merchandise, turned to the right, and felt an immediate stabbing pain in her lower back. She explained that she felt like she had been "cut in half" by the sharp burning pain as if someone had stabbed her in her lower back. Claimant immediately felt numbness going down the outside of her left thigh. This numbness has persisted through the present time.

4. At the time the incident occurred, Claimant testified it felt like her back "went out" and that she blurted out "Oh My God" when the injury occurred. Tiffany Salazar, a co-employee of Home Depot, was working as a cashier at the register next to Claimant when this occurred. She heard Claimant's outburst and asked her what was wrong and if she was okay. When Claimant told her that she didn't think she was okay, Ms. Salazar called the head cashier, Amber, to report what had happened. Amber

brought Claimant a chair to sit on and requested that she finish her shift because they were shorthanded that day. Claimant was able to complete her shift.

5. No written report was filed by Employer or Claimant on the date of injury. Claimant identified Claimant's Exhibit No. 2 as the statement she wrote on 6/23/14 outlining the circumstances surrounding the injury. She completed this statement at the request of Employer. Claimant was injured on a Saturday and the next two days were her regular days off. She did not contact her employer again until 6/24/14 when she was regularly scheduled to work because she thought her condition might improve during the time she was off. On 6/24/14, Claimant called her employer and spoke with her assistant manager, Eric, who told her to come into the store to get a list of treating providers. She did so on 6/24/14 and chose Penrose Hospital where she was seen in the emergency room on 6/27/14. Claimant testified that she was unable to get to the doctor on 6/2514 and 6/26/14 because her car had broken down and she had no transportation. During that time frame, she stayed at home and either iced or placed heat on her lower back to try to control the pain.

6. Dr. Langstaff, the emergency room physician from Penrose-St. Francis noted in her 6/27/14 report that Claimant "accidentally twisted into an awkward position while working as a cashier at Home Depot". Examination of the Claimant revealed moderate paraspinal tenderness in both the lumbar and thoracic spine. Dr. Langstaff suspected that Claimant had sustained a myofascial strain of her lumbar spine and provided a diagnosis of "acute back pain". Claimant testified that the emergency room physician took her off work for three days. Claimant notified her supervisor, Connie, of the results of the emergency room visit and was directed by Connie to get in touch with the Human Resources Department. The Claimant did so and was referred to Concentra where she began treatment with Dr. Randall Jones on 6/27/14.

7. Dr. Jones examined the Claimant and referred her to physical therapy (PT) three times a week for a period of two weeks. When PT did not help and in the face of worsening pain, Dr. Jones referred Claimant for an MRI at Southwest Diagnostics; to Dr. Jeffrey Jenks, a physiatrist; and for chiropractic care with Absolute Health Center. On 6/27/14, Dr. Jones imposed physical restrictions of no lifting more than 10 pounds and no pushing or pulling more than 20 pounds, no squatting, no climbing of ladders or stairs or climbing of any kind. Dr. Jones noted in his initial assessment that Claimant was standing behind a cash register and twisted to the right to put money in the register and felt left lower lumbar pain. The Physician's Report of Worker's Compensation Injury authored by Dr. Jones on 6/27/14 (Claimant's Exhibit 4, p. 6) notes the objective findings he observed to be consistent with the history and/or work related mechanism of injury.

8. Claimant provided Dr. Jones' restrictions to her employer at which time she was informed that her restrictions could not be accommodated. Claimant has not worked for Employer or at any other job since 6/21/14.

9. The ALJ finds that the Claimant is entitled to temporary total disability (TTD) benefits commencing on 6/21/04.

10. Dr. Jones saw Claimant again on July 12, 2014. He again noted that the objective findings he observed were consistent with the history and/or work related mechanism of injury. He continued Claimant's physical restrictions and added that she be provided a chair with a back adjustable to the proper height to complete her cashiering duties.

11. Claimant began physical therapy on July 16, 2014 at Concentra with Katherine Nikolaus, P.T. Ms. Nikolaus noted mild increased muscle tone in both the right and left paraspinal muscles. She also noted severe tenderness of the paraspinal muscles on the left and moderate tenderness on the right. Her record also reflects that the Claimant was unable to lie on her back. On July 17, 2014, Ms. Nickolaus noted that the Claimant should also be sitting 75% of the time while cashiering. The July 18, 2014 physical therapy notes indicate that Claimant reported increased low back pain up to 9 out of 10. The July 25, 2014 therapy note indicates that the Claimant reported worsening of symptoms and was progressing slower than expected.

12. On August 4, 2014, Dr. Randall Jones saw Claimant and noted that if Claimant did not show significant improvement by the next visit, she would need to be referred for an x-ray, an MRI and to Dr. Zimmerman and Dr. Polvi for chiropractic treatment and acupuncture. He continued her physical restrictions. On August 7, 2014, Dr. Jones discontinued physical therapy and referred the Claimant to Dr. Jeffrey Jenks, Absolute Health Center and Southwest Diagnostics.

13. Claimant underwent an MRI on 8/21/14 which revealed a broad-based right foraminal bulge and facet arthrosis at L4-5 and mild right foraminal stenosis. It also revealed a broad based foraminal bulge and left paramedian protrusion L5-1 with mild canal and foraminal stenosis.

14. Claimant saw Dr. Jeffrey Jenks on August 21, 2014. Dr. Jenks recommended a left sacroiliac joint injection.

15. The ALJ finds that the treatment rendered by Dr. Jones and his referrals in this case reasonably necessary to cure and relieve Claimant of the effects of the June 21, 2014 injury.

16. At the time Claimant was hired at Home Depot, she informed Employer that she had restrictions with respect to her knees due to a preexisting degenerative knee condition. She also reported pre-existing multiple sclerosis. Claimant's physical restrictions due to these conditions required her to have use of a chair with a back so that she could sit when needed while performing her cashier duties. At the time Claimant was injured, she was standing and only had a stationary stool (without a back) to sit on. The seat of the stool did not rotate. The Claimant testified that she had previously spoken to an assistant manager, Andy, in the Spring of 2014 regarding her need for a chair with a back on it. She understood the chair to be on back order. She testified she also talked to Andy about the status of the chair in June of 2014 but still had not received it at the time of her industrial injury.

17. Claimant had no preexisting lumbar spine conditions nor had she received treatment for her lumbar spine in the year prior to this claim. Claimant had been seen at Memorial Hospital in the emergency room on April 13, 2014 for burning pain in her shin after receiving a steroid injection to her knee. She explained that this was not the same kind of pain and numbness that she currently has going down the outside of her left thigh since her June 21, 2014 injury. Claimant had also been treated in the emergency room of Penrose St. Francis on April 3, 2014 and April 5, 2014 for knee pain. Finally, Claimant sought treatment through the emergency room of Memorial Hospital on January 25, 2014 for tooth pain. Claimant explained that even though the emergency room report from this visit noted back and neck pain as well as chronic pain, she had no prior back and neck pain and had not been treated for those conditions prior to this industrial injury.

18. Claimant was diagnosed with relapsing and remitting multiple sclerosis (MS) in 2004 after experiencing persistent severe headaches. She did not have any symptoms in her lower back or down her legs at that time. She had a relapse of her MS in 2012 when she lost sight in one of her eyes which eventually returned. Claimant receives social security disability benefits and veteran's administration benefits for her preexisting bilateral knee and ankle issues as well as the multiple sclerosis. At the time of her June 21, 2014 injury, Claimant was taking Oxycodone and Fentanyl for her knee and ankle conditions/pain. She continues to take those pain medications since the injury in this case. She has been given no additional pain medications by Dr. Jones or Dr. Jenks. She also testified that none of her prior medical providers had ever diagnosed her with fibromyalgia.

19. Dr. Allison Fall testified on behalf of the Respondents. Dr. Fall is a Level II accredited physiatrist in the State of Colorado. Dr. Fall opined that the Claimant could not have injured her lower back by the mechanism of injury described by the Claimant. Dr. Fall testified that in her causative analysis, it would not matter how far an individual twisted her trunk nor how many times an individual twists her trunk in a day–twisting at the waist would never cause lower back problems since the human body was "meant" to twist at the waist. Absent any additional weight or bending while twisting, an individual could not injure her low back from merely twisting according to Dr. Fall. Dr. Fall opined that there was no correlation between Claimant's symptoms and the findings on the MRI scan of 8/20/14. She also testified that she did not find any objective findings in her examination of Claimant to substantiate Claimant's pain complaints although she did admit that Claimant could have had muscle spasms which she would not have been able to see or feel at the time she examined the Claimant due to Claimant's obesity.

20. Dr. Fall testified that it is possible that asymptomatic degenerative conditions can become symptomatic in the face of a traumatic event. She also conceded that bulging disks can be sources of pain in the lower back and that individuals with foraminal stenosis can develop pain in their lower back. She admittedly did not review any, nor is she aware of any, records prior to 6/27/14 relating to treatment of Claimant's low back. Dr. Fall also admitted that she was not aware of any other records, prior to 6/27/14, where the Claimant was complaining of radiating leg pain or numbness with the exception of the emergency room report of Penrose Hospital

from 4/3/14 involving pain down the shin after Claimant received a steroid injection to the knee.

21. Dr. Fall further opined that Claimant had preexisting chronic pain associated with fibromyalgia which was probably the source of her ongoing myofascial back pain. However, on cross-examination, Dr. Fall admitted that the basis for this opinion was information that she gleaned from two previous emergency room records which mentioned fibromyalgia in the past medical history section. One of those records was from 2/26/13 (Respondent's Exhibit E, Bates Stamp 156) and one was from 3/3/14 (Respondent's Exhibit D, Bates Stamp 126). Dr. Fall admitted that she had no idea where the diagnosis of fibromyalgia had originated from, nor did she know what doctor or specialist, if any, made the original diagnosis. Additionally, she was not aware of what symptoms (how many tender points and where they were located), if any, the Claimant presented with which resulted in the diagnosis of fibromyalgia. Based upon the totality of the evidence presented, the ALJ is not convinced that Claimant was formally diagnosed with fibromyalgia. Consequently, the ALJ finds Dr. Falls' testimony regarding fibromyalgia as the likely cause of Claimant's low back pain unconvincing. Dr. Fall also opined that she felt the Claimant had some functional overlay in her symptoms due to the Employer failing to accommodate the Claimant's prior work restrictions due to her knee condition (prior to this industrial injury).

22. The Claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of the course and scope of her employment with Home Depot.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights

of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S.* A workers' compensation claim is decided on its merits. Section 8-43-201, supra.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability & Temporary Partial Disability

D. As noted, for an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

E. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). In this case, the evidence demonstrates that Claimant engaged in frequent "twisting" (rotation) of her lumbar spine to complete the duties required of her position as a cashier during her shift. While the ALJ is persuaded that the degenerative findings demonstrated on MRI

were not caused by her twisting, the ALJ finds Dr. Fall's testimony–that Claimant could not have injured her low back twisting at the waist because the human body is designed to twist at the waist–unpersuasive. Similarly, the ALJ is not convinced that Claimant did not injure her low back because Dr. Fall was unable to appreciate any objective findings on physical examination which substantiated Claimant's complaints of low back pain or that Claimant's low back pain is chronic and related to preexisting fibromyalgia. The ALJ notes that Dr. Fall's IME was performed on October 8, 2014, in excess of three months after the date of injury. The medical records closer in time to Claimant's date of injury and thereafter during treatment reflect objective findings consistent with lumbar strain and associated left sacroiliac (SI) joint dysfunction. Moreover, Dr. Fall admitted on cross examination that she based her reliance on "fibromyalgia" as a cause of Claimant's low back pain on information gleaned from two ER reports which mention the diagnosis in the past medical history section of the reports. The ALJ credits Claimant's testimony that she has never been diagnosed with "fibromyalgia". Based upon the totality of the evidence presented, the ALJ concludes that, more probably than not, Claimant suffered a myofascial strain of her lumbar spine and left SI joint while having to twist to complete her work duties. Consequently, the ALJ concludes that a logical causal connection exists between the Claimant's complaints and her work-related duties. Thus, the injury is compensable.

Medical Benefits

F. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). As found, the treatment rendered by Dr. Jones and his referrals in this case was reasonably necessary to cure and relieve Claimant of the effects of the June 21, 2014 injury. Nonetheless, Respondents are only liable for authorized treatment or emergency medical treatment, which may be obtained without prior authorization. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

G. Authorization refers to a physician's legal status to treat the industrial injury at respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Once an ATP has been designated, a claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office*, 996 p.2d 228 (Colo. App. 1999).

H. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio*

v. Industrial Claim Appeals Office, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Here, the persuasive record evidence supports that Claimant was given a list of providers from her employer which included Penrose Hospital ER as a choice. After providing the emergency room record to her employer, Claimant was referred to Concentra Medical Centers where she was seen by Dr. Jones who subsequently made referrals to physical therapy, Southwest Diagnostics, Absolute Health Center (Dr. Polvi and Dr. Hill) and Dr. Jeffrey Jenks. Based upon the evidence presented, the ALJ concludes that Dr. Jones is the designated provider for this claim. Consequently, his treatment and the treatment obtained through his referrals, including the physical therapy obtained through Concentra, the imaging performed at Southwest Diagnostics, the chiropractic care obtained at Absolute Health Centers and the treatment with Dr. Jenks is authorized.

Disability Benefits

I. Pursuant to §§8-42-103, 8-42-105, C.R.S., a claimant is entitled to an award of Temporary Total Disability (TTD) Benefits, if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P.3d 872 (Colo. App. 2001).

K. The term "disability" as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or impairment of bodily function. The second is temporary loss of wage earning capacity, which is evidenced by the Claimant's inability to perform his/her prior regular employment. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The second element of "disability" may be evidenced by showing a complete inability to work, or by physical restrictions which impair a claimant's ability to effectively perform the duties of his regular job. *See Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, the persuasive evidence establishes that Dr Jones has continually imposed physical restrictions which have precluded the Claimant from performing the duties of her usual work since July 8, 2014. The evidence also establishes that the Employer chose not to accommodate those restrictions by offering Claimant a modified duty position. Thus, Claimant has been out of work due to her industrial injury and has suffered a wage loss as a direct consequence. Accordingly, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and entitled to TTD benefits. *Culver v. Ace Electric, supra; Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office. June 11, 1999). Because Claimant's disability has lasted longer than two weeks from the day she left work as a result of her industrial injury, TTD benefits are recoverable from the day she left work, specifically June 21, 2014. C.R.S. §8-42-103(1)(b).

Respondents shall pay TTD in accordance with C.R.S. §8-42-103(1)(b), i.e. beginning June 21, 2014 at a rate of sixty-six and two-thirds percent of her average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week so long as Claimant's disability is total. C.R.S. §8-42-105(1). Such TTD benefits shall continue until the first occurrence of any one of the events enumerated in C.R.S. §8-42-105(3) after which Respondents may terminate such TTD payments.

ORDER

It is therefore ordered that:

1. Claimant's industrial injury to her lumbar spine which occurred on June 21, 2014 is deemed compensable.

2. Respondents shall pay all reasonable and necessary medical bills from Concentra, Absolute Health Centers, Dr. Jeffrey Jenks, the Penrose-St. Francis emergency room and Southwest Diagnostic Center related to this injury.

3. Respondents shall pay Temporary Total Disability benefits in accordance with C.R.S. §8-42-103 from June 21, 2014 to the present and ongoing until such time as TTD benefits may be terminated pursuant to any one of the events enumerated in C.R.S. §8-42-105(3).

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

DATED: January 15, 2015

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The issues in this expedited hearing are compensability, medical benefits, and affirmative defenses to those issues raised by the respondent.

FINDINGS OF FACT

1. The claimant was employed with the respondent-employer as a lead engineer technician II. His job duties primarily consisted of inspection of hospital facilities and maintenance operations throughout the hospital The claimant spent, on average, six or more hours per day engaged in inspection and maintenance.

2. In the summer of 2014, the hospital set out to refurbish a decorative planter at the entrance of their facility. During the construction of this planter, the claimant's job duties remained those of inspection and repair of the hospital. However, the claimant did have some tangential involvement with the planter, occasionally chipping in to help the employees primarily responsible for the refurbishment.

3. The claimant believes that, at some point during the refurbishment of the planter, in July 2014, he either suffered a work related injury to his right shoulder or incurred an occupational disease in his right shoulder.

4. The claimant testified that he spent a significant amount of time over June and July of 2014 installing the landscaping project in front of the hospital. The claimant testified that he alone cut down a large tree in the previous landscaping installation and that he manually dug out the stump of this tree using a pick and shovel. The claimant testified that he attempted to manually remove boulders weighing 200 to 300 pounds and that he leveled the surface of the landscaping installation using a pick and shovel; this testimony included statements that he dug down at least four inches into the ground throughout the landscaping project. To accomplish these tasks, along with any number of additional landscaping labors, the claimant testified he spent over six hours a day working on refurbishing the planter.

5. The claimant also testified that he moved a number of file cabinets and desks throughout the hospital and that to accomplish this task he was only provided a

small dolly for assistance. The claimant did not relate these duties to his shoulder injury, but emphasized the size and weight of these objects.

6. With respect to the onset of his right shoulder symptoms, at hearing the claimant testified his shoulder became symptomatic in January of 2014. He testified that his symptoms increased over June and July of 2014 due to the use of his right upper extremity, although he could not point to an incident or task which led to the increase in symptoms. The claimant further testified that while he did receive an injection for nausea in March of 2014, this did not lead to shoulder pain. The claimant stated that during June and July of 2014, he was in significant pain and was completely unable to use his right arm.

7. The medical records reflect that on or about March 10, 2014, the claimant reported to nurse Porterfield that he was experiencing pain in his right arm as a result of an injection in his right shoulder. On July 2, 2014, the claimant returned to nurse Porterfield complaining of ongoing pain in his right shoulder radiating down to his elbow as a result of the earlier injection.

8. On July 9, 2014, the claimant underwent an x-ray of his right shoulder "for shoulder pain/recent parental injection."

9. The claimant was next seen by Dr. Robert Thomas on July 14, 2014. In his report, Dr. Thomas states, "the patient is a 44-year-old gentleman coming in complaining of about 5 months of right shoulder pain. He does not remember any one specific injury. He reports having had some type of an injection for nausea, and after that, his shoulder started getting painful." An MRI of the claimant's right shoulder revealed a rotator cuff tear. On July 31, 2014 Dr. Thomas performed an arthroscopic repair of the claimant's right shoulder. Since Dr. Thomas' operation, the claimant has been undergoing conservative postoperative recovery and physical therapy.

10. Billy Strickland, head of facilities and maintenance for the hospital, testified credibly regarding the claimant's job duties through June and July 2014. Mr. Strickland explained that the claimant's primary responsibility was the inspection and repair of the hospital facilities and that this job took at least six hours a day. Mr. Strickland testified that the claimant was in a managerial capacity and was to spend time designating tasks to other employees. Mr. Strickland also testified that refurbishing the planter was not the claimant's primary job duty, and that that task was left to a father and son team, Bill and Charlie Antista. Mr. Strickland explained, given the community environment fostered by the hospital, the claimant would occasionally check on the work being done in the planter and on occasions provided some light assistance.

11. Billy Strickland testified regarding the refurbishment of the planter which he designed and implemented. With respect to removing a tree from the old planter, this was done by an independent contractor. Mr. Strickland testified that the ground was leveled using a Bobcat and that the claimant did not have to dig four to six inches into the ground with a pick and shovel. Mr. Strickland explained that the claimant's job duties had him spending at least six hours a day inspecting and maintaining the hospital. Mr. Strickland testified that this was claimant's primary responsibility and would have precluded the claimant from spending the alleged six hours a day on the landscaping project.

12. Mr. Strickland also provided testimony on the issue of moving furniture in the hospital. He testified that any number of dollies or assistive devices were provided for the transportation of furniture.

13. Both Billy Strickland and Tammy Rogers testified regarding the chain of events leading to claimant's resignation. Mr. Strickland and Tammy Rogers both testified credibly that they had no knowledge of claimant's intent to resign until July 22, 2014. On that day, the claimant advised the hospital that he wished to resign, voluntarily executed a letter of resignation, which was accepted by the respondent-employer, and ended his employment.

14. Billy Strickland, Tammy Rogers, and David Rollins (CFO) all provided testimony regarding statements by the claimant that he was not injured on the job. By the time the claimant had resigned from his employment, he had had the opportunity to be examined by several physicians and had undergone an MRI of his shoulder. Nonetheless, during his resignation, the claimant stated to Billy Strickland and Tammy Rogers that he did not injure his shoulder on the job. Additionally, the claimant voluntarily went to the office of David Rollins and, as part of saying farewell, stated that he did not hurt his shoulder on the job.

15. A deposition of the orthopedic surgeon who treated the claimant's shoulder, Dr. Robert Thomas, was conducted on December 1, 2014. The deposition focused directly on the issue of causation. Dr. Thomas testified, "In my opinion, based on his description of the labor work that he was doing, that would be consistent with a rotator cuff tear." Dr. Thomas further testified that he only had a vague description of the claimant's job duties without information on the specifics or durations of the tasks performed by the claimant. It was his understanding the claimant did "a lot of shoveling of heavy gravel or materials prior to a sudden onset of increased pain."

16. At the request of the respondents, the claimant underwent an independent medical examination with Dr. Eric Ridings on October 8, 2014. In this evaluation, the claimant stated to Dr. Ridings that he injured his shoulder in a December 19, 2012 slip-and-fall on ice at work. In his report, Dr. Ridings noted a number of discrepancies between the claimant's reported injury and the medical records. Further, Dr. Ridings concluded, "overall, then, the patient has a history of unexplained pain and paresthesia in the right upper extremity (and later unexplained pain at the left shoulder), with the right upper extremity symptoms beginning after a non-work-related injection on March 5, 2014. His workup for those complaints revealed a rotator cuff tear, although the patient's history to that point was not suggestive of that diagnosis . . . In my judgment within a reasonable degree of medical probability there is no connection between the patient's current symptoms and any incident at work, either in September [*sic*] 2012 or the shoveling of the 3" trench (which is not an activity that would be expected to cause a rotator cuff tear in any case)."

17. The deposition of Dr. Eric Ridings was conducted on December 10, 2014. This deposition focused on the issue of causation. Dr. Ridings testified that he had the opportunity to question the claimant as to his job duties over the summer of 2014, including several specific activities. Dr. Ridings had the opportunity to review numerous medical records relating to claimant's condition going back to 2012.

18. Dr. Ridings testified that when he interviewed the claimant, he stated that he injured his shoulder when he fell at work on December 19, 2012 and that his shoulder pain had continued from that time. Dr. Ridings testified that in his review the medical records he found it was unlikely the claimant sustained a shoulder injury at that time. Dr. Ridings opined that, in reviewing the medical records there were no records connecting the claimant's work activities and the development of the tears of his tendons or his labrum. Dr. Ridings also opined that the numerous inconsistencies in the claimant's statements in the medical records indicated it is unlikely injury occurred while on the job.

19. Finally, Dr. Ridings testified that he could not say, within a reasonable degree of medical probability, that any of the claimant's job activities caused him to have a rotator cuff tear. This testimony was based on his review of the claimant's job duties, in which he noted nothing would have been expected to have caused a rotator cuff tear. Dr. Ridings opined that it is equally probable that outside activities off the job could have caused the condition in the claimant's right shoulder.

20. The ALJ finds that the claimant is a poor historian of his medical conditions.

21. The ALJ finds that the opinions of Dr. Ridings are credible and more persuasive than medical evidence to the contrary.

22. The ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury or occupational disease arising out of and in the course of his employment with the respondent-employer.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201.

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. To the extent the claimant is asserting an injury as opposed to an occupational disease, the claimant must prove by a preponderance of the evidence that at the time of the alleged injury he was performing a service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of

whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

5. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair, supra.*

6. The claimant failed to prove it is more probably true than not that in July 2014 he sustained any work-related injury. The claimant's testimony indicates that he did not suffer a specific injury in July 2014. Instead, the claimant has provided numerous alternate dates of injury. On none of these dates of injury does the claimant point to a specific mechanism of injury.

7. The claimant also testified to any number of arduous tasks conducted in June and July 2014, but the claimant links no specific task or incident to the condition of his right shoulder. The claimant has been thoroughly examined by several physicians, none of whom trace the condition of his right shoulder to a specific action or incident. This includes the claimant's own expert, Dr. Thomas. There is no persuasive evidence to show claimant suffered a compensable work injury in July 2014.

8. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by C.R.S. § 8-40-201(14) as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

9. This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in

everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). However, the existence of a preexisting condition does not defeat a claim for an occupational disease. A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought.

10. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*.

11. The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (I.C.A.O. August 18, 2005).

12. In this case, the claimant failed to prove that he sustained an occupational disease caused, intensified or aggravated by the performance of his duties for the respondent-employer.

13. Dr. Ridings had the opportunity to speak with the claimant regarding his job duties, which he testified would not lead to an occupational disease. Dr. Ridings reviewed the available medical records and testified there was no connection in the records between claimant's work activities and the development of a shoulder injury.

14. The claimant has failed to present sufficient persuasive evidence that he sustained an occupational disease caused, intensified or aggravated by the performance of his duties.

15. The ALJ concludes that the claimant is a poor historian of his medical conditions.

16. The ALJ concludes that the opinions of Dr. Ridings are credible and more persuasive than medical evidence to the contrary.

17. The ALJ concludes that the claimant has failed to establish by a preponderance of the evidence that he suffered an injury or occupational disease arising out of and in the course of his employment with the respondent-employer.

ORDER

It is therefore ordered that:

The claimant's claim for benefits under the Workers' Compensation Act of Colorado is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 13, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained an injury to his right shoulder arising out of and in the course and scope of his employment with employer on August 1, 2014?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received from Dr. McLaughlin and Dr. Copeland was reasonable and necessary to cure and relieve claimant from the effects of the work injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment provided by Dr. McLaughlin and Dr. Copeland was authorized medical treatment?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits?

- If claimant has proven a compensable injury, what is claimant's average weekly wage?

- If claimant has proven a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant committed a volitional act that led to his termination of employment?

FINDINGS OF FACT

1. Claimant was employed with employer as a CDL driver. Claimant began working for employer on July 21, 2014. Claimant's job duties included distributing oil products to customers of employer, including 55 gallon drums containing oil.

2. Claimant testified he first received his CDL license in 2011. In 2014, prior to claimant being hired, claimant underwent a fitness test to renew his CDL license. Claimant testified the fitness test included pushups, sit ups, planking, a hearing test and an eye test. Claimant testified that following the fitness test, claimant's CDL license was renewed.

3. One week after claimant was hired, on July 28, 2014 claimant missed work. Claimant testified at hearing that he was stranded in Denver and he called

employer to let them know of his situation. Claimant's absence was recorded as a no call/no show incident.

4. Claimant testified that on August 1, 2014, he was assigned to drive a truck and deliver 55 gallon drums of oil to the Sommerset Mine near Paonia. Claimant testified that he was assured before he left that the mine would have a fork lift to assist with the unloading of the drums when he arrived.

5. Claimant testified that he loaded 8 barrels of oil, wrapped the barrels in plastic wrap so the barrels would not shift on the drive and began driving to the mine with Mr. Hoyt, the head of sales for employer. Claimant testified he left at approximately noon. Upon arriving at the mine, claimant and Mr. Hoyt checked in with the security guards, were given a short training session on safety at the mine, and were allowed to proceed up to the area of the mine where the oil was to be delivered.

6. Claimant testified that the road to the mine is steep and slow and he and Mr. Hoyt eventually arrived at the gate. Once they arrived at the gate, claimant got out of the truck to check his route and had Mr. Hoyt be his land guide as he maneuvered the truck to unload the oil. Claimant testified that there were two mine employees standing outside the building that housed the generators where the oil was to be delivered.

7. Claimant testified that after getting the truck situated for unloading, claimant noted that there was not a fork lift to help unload the barrels. Claimant testified that Mr. Hoyt was adamant that the oil barrels be delivered or they may lose the account. Claimant testified he informed Mr. Hoyt that he would try to unload the oil barrels, but if anything happened, he was going to return to Grand Junction without unloading the barrels.

8. Claimant testified he began taking the plastic wrap off the oil barrels and was trying to get the barrels off the pallet to unload the barrels. Claimant testified that while doing this, his shoulder popped out and then back into place right away. Claimant testified that Mr. Hoyt then went about trying to find a fork lift, which was eventually located and brought to the truck.

9. Claimant testified that on the drive back to Grand Junction, he reported to Mr. Hoyt that he had hurt his shoulder while trying to unload the barrels. Claimant testified that when he returned to the shop, he reported to Ms. Veatch, the warehouse manager, that he had injured his shoulder. Claimant testified that Ms. Veatch handed claimant an Axiom card and informed him that if his shoulder got any worse, contact Axiom and they would tell him what to do.

10. Claimant testified that he returned to work on Monday and reported to Ms. Veatch that he needed to see someone for his shoulder. Ms. Veatch and claimant called a nurse with Axiom regarding the injury. Claimant testified that approximately an

hour and a half later, a nurse with Axiom called him back and instructed claimant to go to a physician. Claimant testified he was referred to Dr. McLaughlin by employer.

11. Mr. Hoyt testified at hearing regarding the incident on August 1, 2014. Mr. Hoyt testified that he went with claimant to the mine because the mine is difficult to find, and the delivery of the oil was important. Mr. Hoyt testified that sometimes as a courtesy the mine will provide a forklift to help unload a product, but it is not required to do so.

12. Mr. Hoyt testified that after arriving at the mine, claimant expressed concern with regard to the steepness of the hill and the difficulty of getting the truck situated to make the delivery. Mr. Hoyt testified that claimant was becoming loud and was using foul language in the presence of the mine employees. Mr. Hoyt testified that claimant was using obscenities as he believed he was going to have to unload the barrels across the gravel without the use of a fork lift. Mr. Hoyt testified that claimant threatened to take the truck back to Grand Junction without unloading the barrels. Mr. Hoyt testified he felt claimant's behavior at the mine and use of obscenities was inappropriate.

13. Mr. Hoyt testified he witnessed claimant remove the plastic wrap and then Mr. Hoyt went to see if he could find a fork lift. Mr. Hoyt testified he did not see claimant attempt to walk to the barrels.

14. Mr. Hoyt testified that on the drive back to Grand Junction, claimant was highly upset because he had a 4:00 appointment that he was going to be late for. Mr. Hoyt testified that claimant reported to him on the drive back to Grand Junction that he had tweaked his shoulder, but said he wasn't going to do anything about it.

15. When Mr. Hoyt and claimant arrived back at the shop, Mr. Hoyt testified he informed Ms. Veatch that they needed to speak later regarding claimant's behavior. Mr. Hoyt testified that he later spoke to the owner and Ms. Veatch and informed them of claimant's use of obscene language in front of clients and recommended that claimant be let go.

16. Ms. Veatch testified at hearing in this matter. Ms. Veatch testified that she has hiring and firing responsibilities in association with her position as warehouse manager. Ms. Veatch testified that claimant returned to the shop on August 1, 2014 and reported that he had hurt his shoulder earlier in the day.

17. Ms. Veatch testified that later that day, Mr. Hoyt explained to her claimant's behavior in front of the client. Ms. Veatch testified that she had issues with claimant as an employee, including issues with his attendance and the fact that claimant did not want to learn about the product or how to handle the invoices. Ms. Veatch testified that she determined at lunch on August 1, 2014 that claimant was going to be terminated from his position with employer. Ms. Veatch testified that she communicated

her intent to terminate claimant to the parent office in Albuquerque, New Mexico on the morning of August 4, 2014, and advised claimant of his termination when he returned from the physician's office.

18. Ms. Veatch testified on cross examination that the basis for claimant's termination was his lack of interest in the job, the fact that he was antsy, that he would leave work early and missed work without permission. The ALJ notes that claimant was not warned by employer of the fact that his job with employer was in jeopardy based on his lack of interest in the job and his issues with reliability.

19. Claimant sought medical treatment with Dr. McLaughlin on August 4, 2014. Claimant reported to Dr. McLaughlin that he injured his right shoulder while moving 55 gallon drums of oil for employer on August 1, 2014. Claimant was diagnosed with a right shoulder strain and referred for a magnetic resonance image ("MRI") of the right shoulder. The MRI showed an anterior labral tear and tendonopathy and partial bursal surface tear of the supraspinatus.

20. Claimant returned to Dr. McLaughlin on August 13, 2014. Dr. McLaughlin reviewed the findings of the MRI and referred claimant to Dr. Copland for a surgical consultation.

21. Claimant was examined by Dr. Copeland on August 19, 2014. Claimant reported a consistent accident history of injuring his shoulder while moving a barrel of oil off a pallet. Dr. Copeland performed a physical examination and reviewed the MRI findings. Dr. Copeland recommended claimant consider conservative treatment including physical therapy and provided claimant with lifting restrictions of 10 pounds.

22. Claimant returned to Dr. McLaughlin on August 25, 2014. Dr. McLaughlin noted claimant's ongoing complaints and prescribed physical therapy. Claimant was re-examined by Dr. McLaughlin on September 11, 2014. Dr. McLaughlin noted claimant's continued complaints of pain in his shoulder and recommended six more visits of physical therapy.

23. Claimant returned to Dr. Copeland on September 19, 2014 and was examined by physician's assistant Rexroth. Mr. Rexroth noted claimant presented with continued complaints of pain. Claimant had undergone a course of physical therapy, but reported that he felt he was no longer improving. Dr. Copeland and Mr. Rexroth noted that claimant was a surgical candidate and recommended right shoulder arthroscopy with labral repair, subacromial decompression and rotator cuff debridement.

24. Claimant returned to Dr. McLaughlin on September 23, 2014. Dr. McLaughlin noted the surgical recommendation from Dr. Copeland. Dr. McLaughlin opined that the surgical recommendation was reasonable and took claimant off of work completely until after the recommended surgery.

25. The ALJ finds that claimant's report of an injury occurring at work on August 1, 2014 is consistent with the medical records entered into evidence. Claimant reported the injury to Mr. Hoyt and Ms. Veatch on the date the injury occurred. Claimant sought medical treatment from a physician designated by employer on the next working day following his injury. The ALJ finds that claimant has proven that it is more likely than not that he injured his right shoulder in the course and scope of his employment with employer on August 1, 2014 while moving oil drums.

26. The ALJ finds the medical records from Dr. McLaughlin and Dr. Copeland to be credible and persuasive regarding the issue of the reasonableness and necessity of the medical treatment provided to claimant. The ALJ credits the reports as establishing that the medical treatment was related to a mechanism of injury consistent with claimant's testimony at hearing and finds the treatment to be reasonable and necessary. The ALJ further credits the testimony of claimant and Ms. Veatch and finds that claimant was referred by employer to Dr. McLaughlin for medical treatment. The ALJ credits the medical records from Dr. McLaughlin and determines that Dr. Copeland was a referral from Dr. McLaughlin and is likewise within the proper chain of referrals. Therefore, the ALJ determines that the medical treatment from Dr. McLaughlin and Dr. Copeland is authorized under the Colorado Workers' Compensation Act.

27. The ALJ credits the work restrictions set forth by Dr. McLaughlin and Dr. Copeland and claimant's testimony at hearing and determines that claimant has established that he is not capable of performing his regular job duties with the work restrictions set forth by Dr. McLaughlin on August 4, 2014

28. Respondents argue that claimant was responsible for his termination of employment and is therefore, not entitled to TTD benefits. The ALJ credits the testimony of Ms. Veatch and finds that claimant had issues with regard to his employment including a failure to show up for work, and a lack of interest in the job. The ALJ further credits the testimony of Ms. Veatch and determines that the decision to terminate claimant was made at approximately lunch time on August 1, 2014, prior to claimant's injury.

29. However, claimant was not given any written confirmation regarding his poor work performance. Ms. Veatch testified that when claimant did not appear for work, he was not terminated. According to Ms. Veatch, claimant was terminated for a lack of interest and a lack of reliability.

30. Claimant's testimony regarding his work performance and his behavior at the mine on August 1, 2014 is found to be not credible and is not relied on by the ALJ. However, the decision to terminate claimant was made prior to claimant's actions at the mine, and therefore, the ALJ does not take into consideration claimant's unprofessional behavior at the mine when determining if claimant was responsible for his termination of employment. Because the decision to terminate claimant was made at lunchtime on

August 1, 2014, volitional acts by the claimant made after that time did not lead to his termination of employment.

31. Taking into consideration the evidence presented at the hearing that claimant was terminated for a lack of reliability and a lack of interest in the job, the ALJ finds that respondents have failed to establish that it is more probable than not that claimant committed a volitional act that led to his termination of employment.

32. While the testimony does establish that claimant was not reliable, claimant was not terminated for his failure to appear for work on July 28, 2014. Furthermore, while employer presented evidence that claimant was leaving work on the morning of August 1, 2014 to go to the bank for a personal errand, Ms. Veatch testified that she provided claimant with permission to run this errand. Moreover, the credible evidence presented at hearing established that claimant was terminated for a lack of interest in performing the work required by employer, and not because of a volitional act.

33. Claimant was employed with employer from July 21, 2014 through August 4, 2014. Claimant earned $1,072.50 for this period of 15 days (2 1/7 weeks). This equates to an AWW of $500.50. Claimant argues in his position statement that he worked 9 full days prior to being terminated. Claimant argues that the AWW should be calculated based on claimant's daily wage during the 9 full days of employment. The ALJ is not persuaded.

34. The ALJ notes that claimant did not work for employer for an extended period of time (just over two weeks). The ALJ further notes that during those two weeks claimant missed a day of work due to personal reasons. However, the ALJ concludes that the most fair way to calculate the AWW is to consider the full amount of money claimant was paid during the 2 1/7 weeks he was employed with employer. The ALJ recognizes that this includes claimant's final day when he only worked 4.5 hours, but based on the fact that the ALJ has determined that the decision to terminate claimant had occurred prior to his injury the previous Friday, claimant's AWW should include the final day of employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the

employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that he suffered compensable injury arising out of and in the course of his employment with employer when he injured his shoulder on August 1, 2014 while moving the oil barrel.

2. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

5. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has

expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

6. As found, the treatment provided by Dr. McLaughlin and Dr. Copeland was reasonable and necessary to cure and relieve claimant from the effects of her industrial injury. As found, claimant was referred to Dr. McLaughlin by employer after reporting his injury to employer. As found, Dr. McLaughlin subsequently referred claimant to Dr. Copeland for consultation. As found, Dr. McLaughlin and Dr. Copeland are authorized to treat claimant for his injuries arising out of his August 1, 2014 injury.

7. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

8. As found, claimant has proven by a preponderance of the evidence that his injury resulted in work restrictions set forth by Dr. McLaughlin that limited claimant's ability to earn wages. As found, claimant has established that he is entitled to TTD benefits commencing August 5, 2014 and continuing until terminated by law or statute.

9. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In

that context, “fault” requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

10. In this case, Ms. Veatch testified credibly that she had determined that claimant was to be terminated on August 1, 2014 prior to claimant’s injury. Claimant subsequently made the delivery to the mine on behalf of employer and behaved in a manner which was entirely unacceptable in the presence of employees of the client. However, these actions didn’t directly lead to the decision to terminate claimant as that decision had already been made. Instead, claimant was terminated, according to Ms. Veatch, because he was not reliable and had a lack of interest in the position and the product. Respondents have failed to prove that claimant’s reliability issues and lack of interest in the product and position were volitional acts. Therefore, respondents argument that claimant’s right to TTD benefits be denied based on the fact that claimant was responsible for his termination of employment is dismissed.

11. The ALJ must determine an employee’s AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

12. As found, claimant’s AWW for his August 1, 2014 injury is properly calculated at $425.61

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits beginning August 5, 2014 and continuing until terminated by law based on an AWW of $425.61.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 1, 2014 industrial injury provided by Dr. McLaughlin and Dr. Copeland.

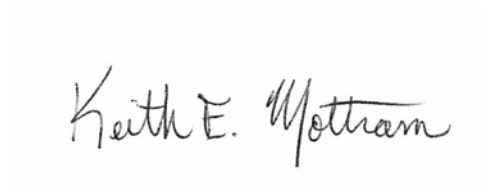
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 15, 2015



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve claimant from the effects of the work injury?

- If claimant has proven a compensable work injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant was employed by employer as an early childhood teacher who works with behaviorally challenged students. Claimant testified at hearing that she began working for employer in 1991. Claimant testified at hearing that the students she works with pre-Kindergarten can, at times, need to be physically restrained in order to keep the child, and other children safe.

2. Over the course of claimant's employment with employer, claimant testified that she has filed many workers' compensation claims with her Employer. She testified that she has sustained numerous minor injuries while working for Employer because of the nature of her work with behavior-challenged children.

3. Claimant testified that her prior claims have included several prior right knee work injuries. Claimant testified that she had a brief period of physical therapy following a 2009 injury when she hit her knee on an electrical box at work. Claimant testified that she did not receive a permanent impairment rating for that injury and did not have any follow-up care. Claimant testified that she had a work injury involving her right knee in 2010 when she slipped on black ice and fell. She testified that she did not have any medical care for that injury.

4. Claimant testified that she has also had prior issues with her neck resulting from work-related injuries. Claimant testified that she never received any permanent impairment ratings to her neck for any of these work injuries.

5. Claimant testified that she also had some non-work-related falls that led to neck symptoms. Claimant testified that she had chiropractic treatment following a fall while at a miniature golf course in 2010 that was non-work related.

6. Claimant's prior medical history includes a course of physical therapy treatment at Mountain View Therapy beginning July 2013 and ending November 2013. Claimant testified that she sought care because her neck was feeling weak and tired, and that she was having neck symptoms when she was flexed forward working with children at work. Claimant testified that she did not have a specific injury, and did not recall a specific onset of neck symptoms. Claimant testified that her symptoms were located at the base of her neck and across her shoulder blades.

7. Claimant testified that following her last visit with the physical therapists on November 27, 2013, she continued performed exercises at home and her neck symptoms improved. Claimant testified that she did not return for physical therapy after November 2013 because her neck felt better. Claimant testified that between November 2013 and February 2014, she did not have any other care involving her neck. claimant testified that just after stopping physical therapy treatment in November 2013, she was doing neck exercises at home three or four times per week and leading up to February 26, 2014, she had reduced her home exercises to twice per week.

8. Claimant testified at hearing that she was no experiencing any symptoms in her left ankle, right knee, or neck on the morning of February 26, 2014. Claimant testified that she arrived at work at approximately 7:30 or 8:00 a.m., met with a co-worker, and then left for Olathe, Colorado where they were going to purchase items from another preschool that was closing its doors. Claimant testified that she and her co-workers arrived at the Olathe preschool and walked around to browse items at the school. Claimant testified she had chosen some items for purchase and was carrying them while walking from a kitchen area and was speaking with Ms. Archuleta, her co-worker. Claimant testified she turned to respond to Ms. Archuleta, and did not see the two to three steps leading downward from the kitchen area. Claimant testified that she fell down the several stairs and landed on her left side on the floor. Claimant testified that she dropped the items she was holding when she fell.

9. Claimant testified that she felt pain in her left ankle and right knee as she stood up. Claimant denied at hearing that she experienced neck symptoms at that time. Claimant testified that she discussed her injury with several coworkers, and reported the injury to employer. Claimant testified that she reported her knee and ankle symptoms but did not mention pain in her neck. Claimant testified she iced her ankle in the truck and filled out an accident report when she got back to the classroom. Claimant testified she mentioned her left ankle and right knee in the accident report, but did not mention her neck.

10. The February 26, 2014 accident report stated that claimant "was carrying items from area to another and missed the steps going down into the other room, landing on my left ankle and falling down." Claimant circled her left ankle and right knee

on the diagram, but did not circle her neck. Claimant testified that she did not have neck symptoms at that time.

11. Claimant testified that in the evening of February 26, 2014, while at home, she began noticing neck symptoms as she watched television. Claimant testified that she had pain at the base of her skull that radiated down the right side of her neck to her shoulder area.

12. Claimant testified that when she woke up the following morning, February 27, 2014, she had a headache and her neck was sore and painful. Claimant sought treatment with Dr. Krebs the morning of February 27, 2014. Claimant testified that Ms. Hunt, the risk manager for employer, had made the appointment with Dr. Krebs for her the day before. Dr. Krebs's report noted that claimant slipped on some steps and fell, landing on her left foot. Dr. Krebs noted that claimant's left ankle, right knee, neck, and upper back were painful. Dr. Krebs also noted that claimant denied any prior right knee trouble, but claimant testified that she had seen Dr. Krebs for work-related right knee issues previously.

13. Dr. Krebs noted that claimant's neck was sore into her shoulder and upper back. Dr. Krebs also noted that claimant had prior neck and shoulder trouble. Dr. Krebs diagnosed claimant with thigh contusion or sprain/strain; left ankle sprain/strain; neck sprain; and thoracic region sprain. Dr. Krebs referred claimant for chiropractic care and released her to return to work full duty.

14. Claimant began a course of chiropractic treatment at Dunnagan Chiropractic on March 4, 2014. Dr. Dunnagain noted that claimant fell at work on February 26, 2014 when she missed steps and fell forward. Dr. Dunnagan noted claimant had neck, left ankle, and right knee symptoms.

15. Dr. Krebs noted on March 17, 2014 that claimant's left ankle and right knee had improved, but her neck remained bothersome. Dr. Krebs recommended additional chiropractic care and again released claimant to full duty.

16. Claimant returned to Dr. Krebs on April 8, 2014. Dr. Krebs noted that claimant continued to have neck symptoms and recommended claimant change from chiropractic care to massage treatment. Dr. Krebs also recommended a neck x-ray. Claimant testified that she and Dr. Krebs discussed the x-ray because her neck symptoms persisted following the injury.

17. Claimant underwent an x-ray on April 18, 2014. The radiologist, Dr. Welsh, noted endplate irregularity and mild disc space narrowing at C6-C7, small anterior osteophytes at C5-C6 and C6-C7, and facet arthropathy at C7-T1. Dr. Welsh's impression was mild degenerative spondylosis.

18. Dr. Krebs reviewed the x-ray results on April 21, 2014. Dr. Krebs again recommended massage therapy and released claimant to full duty. Claimant testified that she continued to work full duty for employer during this time.

19. On May 7, 2014, Dr. Krebs noted that claimant had increased radiating neck pain on the right side of her lower cervical spine. Dr. Krebs indicated that work activity and pulling weight increases her symptoms. Dr. Krebs noted that claimant's school year was nearing the end, and she would have a break in activities that seemed to aggravate her symptoms. Dr. Krebs recommended claimant continue taking ibuprofen and Flexeril.

20. Dr. Krebs noted on May 29, 2014 that claimant had recurring neck discomfort. Dr. Krebs noted that since claimant was now off work, she is more likely to heal since she was no longer caring for children. Dr. Krebs prescribed meidcations and urged claimant to finish massage therapy. Dr. Krebs also recommended a magnetic resonance image ("MRI") of claimant's cervical spine. Claimant testified that she and Dr. Krebs discussed an MRI at that time because her neck symptoms were becoming worse.

21. Claimant underwent an MRI scan on June 16, 2014. Dr. Welsh noted that the reason for the exam was claimant's recent fall and the resulting headaches, neck pain, and bilateral extremity numbness and tingling in her hands. Dr. Welsh noted that claimant had mild degenerative spondylosis most severe at C6-C7, where there was moderately severe left neural foraminal stenosis.

22. Claimant returned to Dr. Krebs on June 3, 2014. Dr. Krebs noted that he discussed claimant's case with Ms. Lindell with insurer and reported in his notes that: "Apparently, [Claimant] has had 12 work comp claims at [Employer]….We discussed the indications of the MR of the neck and it was mainly [] to clear the neck."

23. Claimant again returned to Dr. Krebs on June 18, 2014. Dr. Krebs noted that he had received a lengthy letter from insurer which noted that on February 26, claimant sustained an injury but did not initially complain of neck discomfort. Dr. Krebs noted that claimant had a prior history of neck pain and that while insurer did not dispute that the fall occurred, there was a question as to whether or not the fall caused any new injury or aggravation. Dr. Krebs noted that claimant had neck pain at her initial visit, and had also noted her prior neck pain and treatment. Dr. Krebs noted that claimant made complaints of left ankle, right knee, and neck symptoms when he initially saw her on February 27, 2014 and that claimant's neck symptoms had not resolved.

24. Dr. Krebs noted that he, at that point, did not believe that claimant sustained a new injury or permanent aggravation due to her February 26, 2014 fall based on his review of the MRI scan that did not show any terrible findings. Dr. Krebs opined that claimant was at maximum medical improvement ("MMI") with no permanent impairment that is ratable. Dr. Krebs recommended against maintenance care. At the same time, Dr. Krebs reported that he thought claimant's issues were degenerative, but

with some exacerbation. Dr. Krebs recommended additional physical therapy visits, and noted that claimant could be at MMI within six weeks. Insofar as Dr. Krebs report is ambiguous, the ALJ interprets Dr. Krebs report as indicating that claimant had a pre-existing condition that was exacerbated by the work injury and claimant was not at MMI. This is supported by the hand written physician's report that indicated claimant was not at MMI, but was anticipated to be at MMI in six weeks.

25. Claimant returned to Dr. Krebs on July 1, 2014. Dr. Krebs noted that claimant had not improved much, and was now complaining of numbness in both of her hands, right worse than left. Dr. Krebs noted that her neck remained uncomfortable and further noted that: "I did feel that medically probable new injury happened with [claimant] over her neck in February 2014." Dr. Krebs further noted that he felt claimant had a degenerative issue in her neck which was not unusual for a woman her age and felt it would be beneficial to start physical therapy with home stretching and exercise. Dr. Krebs noted that physical therapy records showed decreased range of motion in claimant's neck and that the goal of physical therapy was to reduce her pain and improve her range of motion. Dr. Krebs reported that he hoped to place claimant at MMI by the end of July.

26. Claimant returned to Dr. Krebs on July 22, 2014. Dr. Krebs noted that claimant was continuing to "move slowly along." Dr. Krebs noted that claimant had a degenerative neck condition that pre-existed her work injury. Dr. Krebs prescribed Flexeril. On August 1, 2014, Dr. Krebs noted that he spoke with claimant over the phone, and that he was recommending additional physical therapy treatment.

27. Claimant testified she had not seen Dr. Krebs since July 22, 2014 for this claim because her claim was denied and additional appointments had been cancelled.

28. Claimant testified at hearing that she sustained a separate work-related shoulder injury on September 2, 2014 unrelated to the present claim. Claimant testified that her neck symptoms were already present from the February 26, 2014 injury, and her right shoulder injury aggravated those symptoms, but that no new injury occurred involving her neck. Following the September 2, 2014 injury, claimant testified she was diagnosed with a right rotator cuff tear and was scheduled for shoulder surgery. Claimant remains under treatment for this separate claim.

29. Claimant testified at hearing that her left ankle symptoms resolved within a few weeks of the February 26, 2014 injury. Claimant testified that she still had right knee symptoms, including swelling and pain. Claimant testified that her right knee symptoms had made it difficult to kneel and squat.

30. Claimant testified that she still has neck symptoms from the February 26, 2014 injury including neck pain, stiffness, and tingling and numbness in her right arm. Claimant testified that her neck symptoms now are different then they were when she had treatment previously, because they have not improved with treatment and exercise. Claimant testified that in the past, she could control and improve her neck symptoms

with physical therapy and exercise, but she has not been able to improve her neck symptoms since the February 26, 2014 injury. Claimant also testified that her current neck symptoms are in a different location than the neck symptoms that caused her to seek physical therapy treatment in 2013: her prior pain was at the base of her neck and along her shoulder blades and her current neck pain begins at the base of her skull and goes down the right side of her neck to her shoulder area. Claimant testified that she has been able to tolerate working for employer by managing her symptoms with ice, a TENS unit at home, medications, and rest. The ALJ finds claimant's testimony regarding her symptoms to be credible and persuasive.

31. Respondents referred claimant to Dr. Sharma for an independent medical evaluation ("IME") on August 14, 2014. Dr. Sharma reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Sharma noted that claimant's neck was not really a part of claimant's claim as it was initially reported as a right knee and left ankle claim. Dr. Sharma noted that claimant's MRI confirmed chronic degenerative changes that were not related to her fall on February 26, 2014. Dr. Sharma opined that claimant was at MMI as of April 1, 2014 and provided claimant with a diagnosis of a left ankle sprain, right knee sprain and a final impairment rating of 0% whole person. Dr. Sharma opined claimant did not need maintenance medical treatment related to her claim.

32. Dr. Sharma testified at hearing in this matter. Dr. Sharma's testimony was consistent with his August 14, 2014 IME report. Dr. Sharma testified that claimant's February 26, 2014 injury involved her right knee and left ankle, and that both of those conditions had resolved. Dr. Sharma testified that there were no objective findings in claimant's neck to explain her symptoms, but testified that claimant had undergone a neck MRI with several findings, including foraminal stenosis. Dr. Sharma testified that claimant sustained an accident on February 26, 2014, but not an injury because there was no disability associated with the event.

33. Dr. Sharma acknowledged on cross-examination that claimant's injury resulted in medical treatment for her knee and ankle, but opined that the treatment for claimant's neck was not related to the claimant's work injury. Instead, Dr. Sharma opined that claimant's neck symptoms that had manifested themselves sporadically prior to claimant's injury developed again after her injury and unrelated to her fall.

34. Dr. Sharma testified about claimant discontinuing her physical therapy care in November 2013. He testified that the therapist's January 22, 2014 note stated that "intervention goals and functional outcomes not achieved," and therefore claimant's neck symptoms must have still been present on February 26, 2014. The ALJ credits claimant's testimony that her neck symptoms had resolved prior to February 26, 2014 over Dr. Sharma's testimony that hypothesized that claimant's neck conditions continued to persist based on his review of the physical therapy records.

35. Dr. Sharma testified that although claimant fell and landed on the floor on February 26, 2014, developed neck pain later in the evening, and reported neck pain to

her doctor the following day, it is more likely that claimant's neck symptoms developed "spontaneously." The ALJ finds Dr. Sharma's testimony in this regard to be not credible.

36. The ALJ finds that claimant has proven that it is more likely than not that she sustained a compensable injury to her left ankle, right knee and neck on February 26, 2014. The ALJ notes that even respondents expert appears to agree that claimant injured her left ankle and right knee on February 26, 2014. Respondents argue that the claim as a whole is not compensable because claimant's injury did not result in a disability. However, on the issue of compensability, claimant needs only to establish that the accident resulted in disability or the need for medical treatment.

37. In this regard, the ALJ credits the medical opinions expressed by Dr. Krebs in his records over the contrary opinions expressed by Dr. Sharma in his report and testimony and finds that claimant has proven that it is more likely than not that she suffered a compensable injury arising out of and in the course of her employment with employer. The ALJ finds claimant's testimony regarding her symptoms to be consistent with the medical records in evidence. The ALJ credits claimant's testimony that she injured her left ankle and right knee just when she fell while working on February 26, 2014. The ALJ further credits claimant's testimony that she did not have neck symptoms in the days prior to February 26, 2014 and did not have neck symptoms on the morning of February 26, 2014 before the injury occurred. The ALJ credits claimant's testimony that she developed neck symptoms after returning home the evening of February 26, 2014 and finds that claimant has proven that it is more likely than not that her neck became symptomatic when she tripped and fell while working on February 26, 2014.

38. The ALJ notes that claimant reported the existence of the neck symptoms to Dr. Krebs less than 24 hours after the accident and finds that claimant has established that it is more likely than not that the fall on February 26, 2014 caused, aggravated, accelerated or combined with her pre-existing condition to result in the need for medical treatment.

39. The ALJ credits the medical opinions expressed by Dr. Krebs in his records and claimant's testimony over the contrary opinions expressed by Dr. Sharma in his report and testimony and finds that claimant has proven that it is more likely than not that the medical treatment she received from Dr. Krebs, Dunnagan Chiropractic, Montrose Massage Therapy, and from the physical therapists on referral from Dr. Krebs was reasonable and necessary to cure and relieve the claimant from the effects of her industrial injury. Specifically, the ALJ finds that the office visits with Dr. Krebs after the February 26, 2014 injury were reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury. Respondents are liable for the medical treatment provided by Dr. Krebs and his referrals pursuant to the Colorado Medical Fee Schedule set forth by the Division of Workers' Compensation.

40. Claimant testified that her monthly pay at the time of the injury was $2,843.75. Claimant testified that she received a pay raise at the beginning of the 2014-2015 school year to $2,913.83 per month. Claimant argues that her AWW should be based on the amount she was paid after her raise at the beginning of the 2014-2015 school year. The ALJ is not persuaded.

41. Claimant's AWW is to be established by the rate at which claimant was paid at the time of the injury. Claimant was earning a monthly salary of $2,843.75 at the time of her injury. This results in an AWW of $656.25 ($2,843.75 x 12 divided by 52).

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has proven by a preponderance that she suffered compensable injury arising out of and in the course of his employment with employer when she fell at work on February 26, 2014.

5. Respondents argue at hearing that claimant's claim is not compensable because it did not produce disability. However, case law does not require that an injured worker establish that the injury result in disability where the injury aggravates, accelerates or combines with a pre-existing disease to produce the need for treatment. In fact, the vast majority of work related injuries result in the need for treatment, but not necessarily disability. This does not make these injuries "non-compensable" accidents and holding that there needs to be a finding of "disability" before the claim is determined to be compensable could result in significant issues in which medical treatment is necessary, but the injury doesn't result in a disability. In fact, ijured workers could end up facing the possibility of having to pay out of pocket for medical treatment that is reasonable and necessary if their injury does not result in a "disability". This is not the intent of the Act.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. As found, claimant has established that the medical treatment provided by Dr. Krebs for her ankle, knee and neck symptoms was reasonable and necessary to cure and relieve claimant from the effects of her work related injury. Therefore, respondents are liable for the cost of the medical treatment provided by Dr. Krebs and his referrals pursuant to the Colorado Medical Fee Schedule established by Division of Workers' Compensation.

8. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995). The general assembly has established that the phrase "at the time of injury" as used in subsection (2) of Section 8-42-102 refers to the date of the employee's accident. When subsection (2) of Section 8-42-102(2) is used to determine a worker's AWW, the wage on the date of the accident shall be used. Section 8-42-102(5)(a), C.R.S.

9. While the ALJ may still have discretion to use an alternative method for calculating an injured worker's AWW under the statute, the ALJ in this case determines that such discretion is not necessary under the facts of this case.

10. Therefore, the ALJ determines that Claimant's AWW is properly established at the time of her accident as $656.25.

ORDER

It is therefore ordered that:

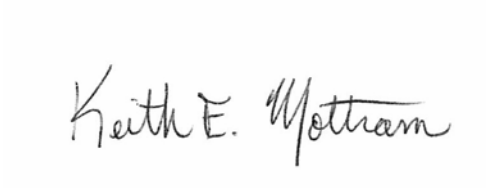
1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve the claimant from the effects of her industrial injury provided by Dr. Krebs and his referrals to claimant's left ankle, right knee and neck pursuant to the Colorado Medical Fee Schedule.

2. Claimant's AWW is established to be $656.25.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 26, 2015



Keith E. Mottram
Administrative Law Judge
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ISSUES

The issues for determination are:

1. Compensability;

2. Medical benefits;

3. Temporary partial disability benefits;

4. Temporary total disability benefits; and,

5. Whether the right of selection of the authorized treating physician has passed to the claimant.

STIPULATION

The parties stipulated that if the claim were found to be compensable that the claimant's average weekly wage is $556.10.

FINDINGS OF FACT

1. The claimant is a 52-year old cleaner who at the time of the claimed injury on June 10, 2014 worked for the respondent-employer. The claimant was hired by the respondent-employer on September 5, 2011.

2. The claimant's duties consisted of cleaning houses at Schriever Air Force Base for military personnel. Her duties included cleaning kitchens, bathrooms, windows, walls, floor, fixtures, and carpets. She was responsible for carrying all cleaning supplies to and from the houses she cleaned. Her cleaning supplies included a ladder, which she described as heavy. The claimant needed to use the ladder on a daily basis to reach things that needed to be cleaned.

3. The claimant began experiencing pain in her low back in May, 2014 as a result of carrying and working with the ladder.

4. The claimant was off work the week of May 26, 2014. Her low back pain eased during this time.

5. The claimant returned to work on June 2, 2014. Her low back pain increased due to lifting and carrying a ladder.

6. The respondent-employer's maintenance technician, Ed Romero, testified that the claimant told him she was having low back pain as a result of working with the ladder. He was familiar with the type of ladder the claimant used, and considered it to be heavy. The ALJ finds Mr. Romero's testimony to be credible and persuasive.

7. The claimant worked 10 hours on Monday, June 9, 2014. On June 10, 2014, she participated in a "stretch and flex" session at the respondent-employer's direction prior to beginning her work duties. Her low back pain was severe. She reported her low back pain to Steve Oser, the respondent-employer's Safety Manager. She told him her back pain was caused by working with the heavy ladder. The claimant was assigned to count inventory in a warehouse the rest of that day. She worked only 2.5 hours, then left to see a chiropractor.

8. The respondent-employer did not give the claimant a list of physicians to choose from to treat her injury. The respondent-employer did not post notices that a work related injury must be reported in writing.

9. The claimant saw chiropractor Travis Mauzy, D.C., on June 10, 2014. He noted, "…[the claimant] was in my office due to severe acute pain. It is my recommendation that she not work until I can re-evaluate her on Thursday."

10. The claimant was off work as a result of the effects of her injury on Wednesday, June 11 and Thursday, June 12, 2014. She returned to work on Friday, June 13, 2014 and was assigned to return to her regular job as a cleaner.

11. The claimant saw Sonia Seufer, M.D., at Colorado Springs Health Partners on July 31, 2014. Dr. Seufer issued work restrictions. The claimant presented Dr. Seufer's note to the respondent-employer.

12. On August 1, 2014, Dr. Seufer wrote a note indicating, "[The claimant] is under treatment for a back injury and sciatica which I feel is a work related injury." The claimant presented Dr. Seufer's note to the respondent-employer.

13. The respondent-employer provided modified duty work to the claimant beginning August 1, 2014.

14. The claimant presented to Dr. Walter Larimore at Concentra Medical Center on August 4, 2014. Dr. Larimore noted she was "…sent here for a one-time evaluation." He reported, "…51 y/o WWF with no history of back pain or injury who had a lumbar strain WC injury treated here from 10/28/13 until MMI on 11/18/13. Was asymptomatic until Monday, June 2. For the two weeks prior to that was having to carry a very heavy ladder. Was off from 5/29 through 6/1 to see her son graduate. Returned to work on Monday, June 2 and began to have bilateral low back pain that she believes was aggravated by a combination of carrying the heavy ladder and having to work 10 hours or more a day doing house cleaning on the Army post. Initial pain was noted on Monday night, 6/2/14 and worsened over that week. As the pain worsened, it also began to radiated [sic] down the left buttock…" Dr. Larimore diagnosed "lumbar pain with radiation down left leg," and "depression."

15. On August 5, 2014, Dr. Larimore reported, "…In my opinion, based upon her history and physical, there is a [greater than] 50% chance that these problems are due to a NEW work-related injury and NOT to her previous injury." [Emphasis in original]. Dr. Larimore's recommendations included medications, psychological therapy, physical therapy, and work restrictions.

16. Dr. Larimore continued the claimant's work restrictions on September 24, 2014.

17. On October 1, 2014, Kenneth Ginsburg, P.A., at Concentra reported, "…It was and is my opinion that this is a new injury and not related to her low back injury that was cared for under WC from 10/28/13 until 11/18/13. Has finally been approved for care here." PA Ginsburg noted , "...Her symptoms are about the same, she still has left low back pain radiating down her left leg…" PA Ginsburg diagnosed lumbar strain and sacroiliitis.

18. On October 2, 2014, Dr. Randall Jones of Concentra reported, "…This has finally been deemed a new injury. She is working light duty. She has not had MRI or pain specialist yet…" Dr. Jones referred the claimant for pain management with Dr. Jenks; for psychological treatment; and for MRI testing of both the lumbar spine and SI joints to rule out disc pathology.

19. MRI of the lumbar spine on October 21, 2014 revealed a L3-4 disc herniation/protrusion and annular tear displacing the descending nerve roots on the left side.

20. On October 23, 2014, Dr. Jones at Concentra referred the claimant to Dr. Polvi for chiropractic and/or acupuncture treatment. He also referred the claimant to Dr. Jenks "…for consideration of ESI." The referrals were not authorized.

21. The respondent-employer sent a letter to the claimant on October 28, 2014, advising that it "…has run out of meaningful work for you to do as a cleaner that will meet the restrictions presented on the [sic] October 23, 2014. As a result of this, the expectation is that you will file for a leave of absence and not return to work until you can perform the duties of your job." The claimant has been unable to work since then as a result of the effects of her injury.

22. The respondent-insurer arranged for A.C. Lotman, M.D., to perform a medical records review. Dr. Lotman issued a report dated November 5, 2014. Dr. Lotman opined that the medical treatment the claimant has received "…has been reasonable and necessary, and related to the June 10, 2014, DOL." Dr. Lotman opined that the claimant's "…current symptoms are causally related to the DOL of June 10, 2014." The ALJ finds those opinions of Dr. Lotman to be credible and persuasive.

23. Jack Rook, M.D., examined the claimant on November 12, 2014 and issued a report of the same date. Dr. Rook testified consistently with his report. He testified regarding the claimant's symptoms, his findings on physical examination, and his diagnosis. Dr. Rook opined the claimant sustained an injury in the form of an occupational disease, resulting from her working with and carrying the heavy ladder that the claimant described. Dr. Rook opined the claimant's symptoms and objective physical findings are consistent with the pathology demonstrated on her lumbar MRI. Dr. Rook opined the claimant has not reached MMI, and needs additional testing and treatment. The ALJ finds Dr. Rook's opinions to be credible and persuasive.

24. The claimant has selected Dr. Rook to treat her for the effects of her occupational disease.

25. The ALJ finds that the claimant has established that it is more likely than not that she suffered an occupational disease arising out of and in the course of her employment with the respondent-employer. The date of onset of the claimant's disability was June 10, 2014.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he or she suffered a disability that was proximately caused by an injury or disease arising out of and within the course and scope of employment. Section 8-41-301(1) (c), C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for the determination of the Judge. *Faulkner*, 12 P.3d. at 846.

5. The ALJ finds the claimant to be credible.

COMPENSABILITY OF THE OCCUPATIONAL DISEASE CLAIM

5. An "occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. Under this statute the claimant bears the burden to prove that the disease was "directly and proximately caused" by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

7. Expert opinion is neither necessary nor conclusive on the issue of causation. However, where expert opinions are presented it is for the ALJ to assess their weight and credibility. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The question of whether the claimant has proven causation is one of fact for resolution by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 1999).

8. As found, the claimant proved by a preponderance of the evidence that the disease affecting her lumbar spine was proximately caused, intensified or aggravated by her use, over time, of the heavy ladder in her workplace. The ALJ is persuaded by the opinions of Dr. Lotman and Dr. Rook, as well as they opinions of the Concentra medical personnel, that the cause of the claimant's lumbar spine problems was her work activities for the respondent-employer.

MEDICAL BENEFITS

9. Because this matter is compensable, the respondent-insurer is liable for medical treatment which is reasonably necessary to cure or relieve the the claimant from the effects of her industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). All of the medical treatment the claimant received for her industrial injury, from June 10, 2014 and onward, was reasonable and necessary. The respondent-insurer is liable for payment of that treatment, as well as all additional treatment necessary to cure and relieve the claimant from the effects of the injury.

RIGHT OF SELECTION OF THE TREATING PHYSICIAN

10. Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the respondent-employer failed to furnish the claimant with a list of authorized physicians. Accordingly, the right of selection passed to the claimant and she selected Jack Rook, M.D., to treat her. Dr. Rook is an authorized treating physician.

TEMPORARY PARTIAL DISABILITY BENEFITS

12. To prove entitlement to TPD benefits, the claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. Section 8-42-106, C.R.S. *See also, PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Here, as a result of the injury the claimant experienced an unspecified partial wage loss beginning June 10, 2014 and continuing through and including October 27, 2014.

TEMPORARY TOTAL DISABILITY BENEFITS

13. To prove entitlement to TTD benefits, the claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, supra. Section 8-42-103(1)(a), requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

14. Here, the claimant was working modified duty effective August 1, 2014 until the respondent-employer advised her on October 28, 2014 that it no longer had such work available for her. The claimant has been unable to return to work since that time due to the effects of her occupational disease. The disease caused a disability lasting more than three shifts, claimant left work as a result of the disability, and the disability resulted in actual wage loss. The claimant has established by a preponderance of the evidence that she is entitled to TTD benefits effective October 28, 2014, and continuing until such benefits can be terminated pursuant to law.

[The Order continues on the following page.]

ORDER

It is therefore ordered that:

1. The claimant's claim for benefits under the Workers' Compensation Act of Colorado is compensable.

2. The date of onset of Claimant's disability is June 10, 2014.

3. The respondent-insurer is liable for payment of all of the treatment received since June 10, 2014 as well as all additional treatment necessary to cure and relieve the claimant from the effects of the injury.

4. Dr. Rook is the claimant's primary authorized treating physician.

5. The respondent-insurer shall pay TPD benefits to the claimant beginning June 10, 2014 and continuing through and including October 27, 2014 to be determined by the parties.

6. The respondent-insurer shall pay TTD benefits to the claimant beginning October 28, 2014, and continuing until such benefits can be terminated pursuant to law.

7. The respondent-insurer shall pay interest to the claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATE: January 2, 2015

/s/ original signed by:
Donald E. Walsh
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable right hip injury on June 23-24, 2014 during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Garden Associate. His job duties involved unloading bundles of tools from wooden crates, stocking merchandise, assisting customers and cleaning. Claimant was required to squat, bend, kneel, lift, twist and pivot on a daily basis for extended periods of time.

2. Claimant also worked as a free-lance mechanic on an occasional basis prior to and during his employment with Employer. He fixed brakes, timing belts and motor mounts. Claimant performed most of this work in a seated position on the floor or leaning over the engines.

3. Claimant testified that on June 23, 2014 he was removing shovels from crates and stocking them on shelves. He noticed a sharp pain and warmth in his right hip. Claimant reported that the pain quickly subsided and he finished his shift without any further problems.

4. On June 24, 2014 Claimant was unpacking, lifting and stocking lawnmowers for approximately two hours when he noticed a popping sensation in his right hip. Subsequently, a customer requested assistance with loading a lawnmower into his vehicle. Claimant loaded the lawnmower onto a flat cart then into the customer's car. The popping and pain increased as Claimant began walking to the vehicle. As Claimant was returning to the store, he saw a supervisor walking toward him and asked her to feel the popping in his right hip area. The supervisor noticed that the popping was not right and advised him to seek medical attention.

5. On June 24, 2014 Claimant visited Katherine Drapeau, D.O. at OccMed Colorado for an examination. Claimant reported that in the early afternoon of June 23, 2014, after loading and unloading merchandise throughout the day, he noticed warmth and pain in his right hip greater trochanteric area. Dr. Drapeau noted, "[t]his morning when he went to work his hip started making popping sounds every time he stepped." She remarked that Claimant had no prior history of a right hip injury. Dr. Drapeau

summarized that Claimant had tenderness over the right greater trochanter and right hip popping when walking. She diagnosed Claimant with right greater trochanteric bursitis.

6. On July 1, 2014 Jim Keller, PA-C stated that his objective findings were consistent with a work-related mechanism of injury. He diagnosed Claimant with right greater trochanteric bursitis. PA-C Keller referred Claimant to physical therapy, wrote a prescription for Tramadol and recommended continued Ibuprofen.

7. On July 8 and July 22, 2014 Dr. Drapeau's objective findings remained consistent with her initial diagnosis of right greater trochanteric bursitis and a right hip sprain from a work-related mechanism of injury. Dr. Drapeau stated, "[b]ecause of the increase in pain and the palpable popping, I would like to make sure there is nothing wrong with the labrum of the hip joint, and MRI/arthrogram has been ordered."

8. A July 31, 2014 MRI/arthrogram of Claimant's right hip revealed a full thickness 8 to 12 mm anterior labral tear very near the midequatorial line. There were underlying features of femoroacetabular impingement. On August 1, 2014 PA-C Keller referred Claimant to Brian White, M.D. for orthopedic treatment of his hip.

9. On August 19, 2014 Brian White, M.D. evaluated Claimant and recommended right hip arthroscopic surgery to repair Claimant's labral tear. However, he noted that Claimant would need to lose about 40 pounds prior to the surgery.

10. On September 4, 2014 Claimant visited Greg Smith, M.D. for an examination. Dr. Smith noted that on June 23, 2014 Claimant had been unloading, lifting and stocking merchandise weighing up to 100 pounds when he developed pain and popping in his right hip. After conducting a physical examination, Dr. Smith diagnosed Claimant with a right hip sprain/strain, right hip greater trochanteric bursitis and an acute labral tear. He agreed with Dr. White that Claimant required surgery to repair his right hip condition. Dr. Smith remarked that Claimant did not exhibit any signs of prior right hip degeneration or injury. He summarized that "[a]fter going through his review of history and the MRI, I am uncertain how anyone could come to the conclusion that this was not a work-related injury, unless there is something that the insurance company knows previously that is not in the records. This injury did occur on the stated date and is work comp. related, at this point in time."

11. On September 8, 2014 Respondents filed a Notice of Contest challenging Claimant's claim for Workers' Compensation benefits.

12. On October 22, 2014 Claimant underwent an independent medical examination with Edward M. Healey, M.D. He issued a report and testified at the hearing in this matter. He reported that Claimant first experienced a burning sensation in his right hip on June 23, 2014 after stocking tools for Employer for two hours. Dr. Healey remarked that Claimant's pain returned on the following day after moving lawnmowers for one hour. He concluded that Claimant had pre-existing right hip abnormalities including a femoral acetabular impingement with increased alpha angle, pistol grip appearance of the femoral head and neck junction and mild dysplasia. He

noted that the pre-existing condition predisposed Claimant to having a labral tear. Dr. Healey explained that Claimant's repetitive job activities for Employer caused his pre-existing condition to become symptomatic and resulted in a labral tear. He noted that the Impingement/Labral Tear section of the Medical Treatment Guidelines states that impingement abnormalities are usually congenital. However, the condition may be aggravated by repetitive rotational forces such as twisting, squatting and kneeling.

13. Dr. Healey concurred with doctors Smith and White that Claimant had a work-related injury to his right hip that requires surgical correction. Dr. Healey stated that if Claimant does not receive the surgical procedure, he will have increasing, ongoing degenerative changes in the right hip and eventually require a right hip replacement. He noted that Claimant also needs to be referred to a dietician to help him with weight loss so he can reach 240-pounds as recommended by Dr. White. Dr. Healey also maintained that Claimant requires a health club membership with a pool so he can perform pool exercises to help him lose weight. Finally, in regard to right lateral femoral cutaneous nerve neuropathy, Claimant needs further evaluation with an ultrasound and possible cortisone injections. Dr. Healey also commented that it would be beneficial to obtain a lumbar MRI to make sure there is no evidence of an L2-3 disc herniation contributing to Claimant's right hip pain and right thigh numbness.

14. On October 10, 2014 Allison M. Fall conducted an independent medical examination of Claimant and issued a report. On December 3, 2014 the parties conducted the post-hearing evidentiary deposition of Dr. Fall. Dr. Fall explained that Claimant's MRI was not consistent with an overuse-type of injury. The MRI revealed an acute labral tear with no signs of past degeneration. Dr. Fall determined that the MRI showed a configuration of the hip that leads to impingement and tends to wear and tear the labrum. She noted that the type of tear had nothing to do with lifting, walking or other work activities.

15. Dr. Fall determined that Claimant's work duties would not be considered repetitive activities. She noted that his job description included many different types of duties including moving merchandise, helping customers, cleaning and walking down aisles. Dr. Fall testified that Claimant's work involved many different movements and activities throughout the day. She explained that the Medical Treatment Guidelines do not have a chapter for cumulative trauma disorders to the hip because the injury would be unusual.

16. Dr. Fall also noted that there was no evidence to support that Claimant sustained a traumatic, acute labral tear on the morning of June 23, 2014 or the afternoon of June 24, 2014. She commented that Claimant's reports of feeling warmth and momentary pain on June 23, 2014 and popping on June 24, 2014 were instead consistent with the symptoms of a pre-existing labral tear. Dr. Fall testified that Claimant had a pre-existing configuration of the hip that predisposed him to impingement of the hip and led to the labral tear. Therefore, she concluded that Claimant's right hip condition was not caused by his employment for Employer.

17. Claimant has established that it is more probably true than not that he sustained a compensable right hip injury on June 23-24, 2014 during the course and scope of his employment with Employer. On June 23, 2014 Claimant was removing shovels from crates and stocking them on shelves. He noticed a sharp pain and warmth in his right hip. Claimant reported that the pain quickly subsided and he finished his shift without any further problems. On the following day Claimant was unpacking, lifting and stocking lawnmowers for approximately two hours when he noticed a popping sensation in his right hip. Claimant's right hip popping subsequently increased as he walked to a customer's car to load a lawnmower. The medical records reflect that Claimant consistently reported his mechanism of injury and suffered an aggravation of his pre-existing right hip condition.

18. Dr. Drapeau initially diagnosed Claimant with right greater trochanteric bursitis and a right hip sprain from a work-related mechanism of injury. Moreover, PA-C Keller also noted that his objective findings were consistent with a work-related mechanism of injury. A July 31, 2014 MRI/arthrogram of Claimant's right hip revealed a full thickness 8 to 12 mm anterior labral tear very near the midequatorial line. There were underlying features of femoroacetabular impingement. Dr. Smith subsequently diagnosed Claimant with a right hip sprain/strain, right hip greater trochanteric bursitis and an acute labral tear. He agreed with Dr. White that Claimant required surgery to repair his right hip condition. Dr. Smith remarked that Claimant did not exhibit any signs of prior hip degeneration or injury. Finally, Dr. Healey concluded that Claimant had pre-existing right hip abnormalities including a femoral acetabular impingement. He noted that the pre-existing condition predisposed Claimant to suffering a labral tear. Dr. Fall also determined that Claimant had a pre-existing configuration of the hip that predisposed him to impingement of the hip and led to the labral tear. However, she concluded that Claimant's right hip condition is not related to his employment for Employer because his job duties were not repetitive and his symptoms were consistent with a pre-existing labral tear. Nevertheless, Dr. Fall's analysis failed to adequately consider the aggravation of a pre-existing right hip condition. Although Claimant suffered from a pre-existing condition, the temporal proximity of his symptoms and medical records reflect that his work activities on June 23-24, 2014 combined with his pre-existing right hip condition to produce a need for medical treatment.

19. Claimant has demonstrated that it is more probably true than not that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Dr. White recommended right hip surgery and doctors Smith and Healey concurred with the surgical procedure. Accordingly, Claimant is entitled to reasonable and necessary medical treatment in the form of right hip arthroscopic surgery to repair a labral tear as recommended by Dr. White.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-

40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has established by a preponderance of the evidence that he sustained a compensable right hip injury on June 23-24, 2014 during the course and scope of his employment with Employer. On June 23, 2014 Claimant was removing shovels from crates and stocking them on shelves. He noticed a sharp pain

and warmth in his right hip. Claimant reported that the pain quickly subsided and he finished his shift without any further problems. On the following day Claimant was unpacking, lifting and stocking lawnmowers for approximately two hours when he noticed a popping sensation in his right hip. Claimant's right hip popping subsequently increased as he walked to a customer's car to load a lawnmower. The medical records reflect that Claimant consistently reported his mechanism of injury and suffered an aggravation of his pre-existing right hip condition.

7. As found, Dr. Drapeau initially diagnosed Claimant with right greater trochanteric bursitis and a right hip sprain from a work-related mechanism of injury. Moreover, PA-C Keller also noted that his objective findings were consistent with a work-related mechanism of injury. A July 31, 2014 MRI/arthrogram of Claimant's right hip revealed a full thickness 8 to 12 mm anterior labral tear very near the midequatorial line. There were underlying features of femoroacetabular impingement. Dr. Smith subsequently diagnosed Claimant with a right hip sprain/strain, right hip greater trochanteric bursitis and an acute labral tear. He agreed with Dr. White that Claimant required surgery to repair his right hip condition. Dr. Smith remarked that Claimant did not exhibit any sign of prior hip degeneration or injury. Finally, Dr. Healey concluded that Claimant had pre-existing right hip abnormalities including a femoral acetabular impingement. He noted that the pre-existing condition predisposed Claimant to suffering a labral tear. Dr. Fall also determined that Claimant had a pre-existing configuration of the hip that predisposed him to impingement of the hip and led to the labral tear. However, she concluded that Claimant's right hip condition is not related to his employment for Employer because his job duties were not repetitive and his symptoms were consistent with a pre-existing labral tear. Nevertheless, Dr. Fall's analysis failed to adequately consider the aggravation of a pre-existing right hip condition. Although Claimant suffered from a pre-existing condition, the temporal proximity of his symptoms and medical records reflect that his work activities on June 23-24, 2014 combined with his pre-existing right hip condition to produce a need for medical treatment.

Medical Benefits

8. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

9. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury. Dr. White recommended

right hip surgery and doctors Smith and Healey concurred with the surgical procedure. Accordingly, Claimant is entitled to reasonable and necessary medical treatment in the form of right hip arthroscopic surgery to repair a labral tear as recommended by Dr. White.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable right hip injury on June 23-24, 2014 during the course and scope of his employment with Employer.

2. Claimant is entitled to reasonable and necessary medical treatment in the form of right hip arthroscopic surgery to repair a labral tear as recommended by Dr. White.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: January 26, 2015.

DIGITAL SIGNATURE:

Peter J. Cannici

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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203